

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. 221

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AMERICAN SMELTING AND REFINING COMPANY,  
APPELLANT,

vs.

THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

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FILED FEBRUARY 3, 1921.

(28,085)



(28,085)

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1920.**

**No. 728.**

**AMERICAN SMELTING AND REFINING COMPANY,  
APPELLANT,**

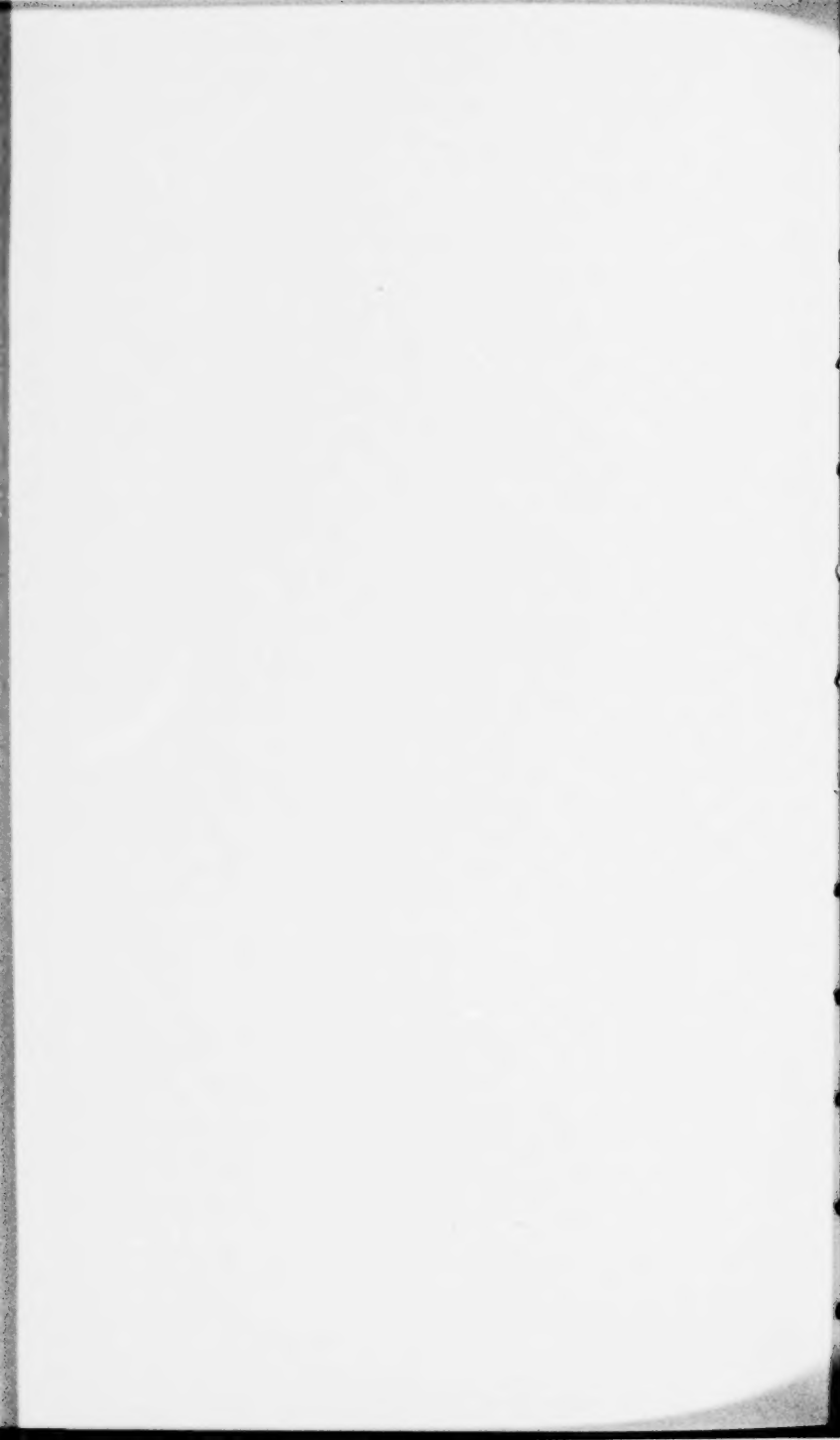
*vs.*

**THE UNITED STATES.**

**APPEAL FROM THE COURT OF CLAIMS.**

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In the Court of Claims.

No. 34621.

AMERICAN SMELTING AND REFINING COMPANY

vs.

THE UNITED STATES.

I. *Petition.*

(Filed May 28, 1920.)

To the Honorable the Court of Claims:

The Claimant, American Smelting and Refining Company, respectfully represents:

1. The claimant is a corporation organized under the laws of the State of New Jersey, having an office for the transaction of business at No. 120 Broadway, in the City and State of New York.

II. For a long time preceding the declaration of war with Germany on the 6th day of April, 1917, the claimant company had been engaged in the production, sale and distribution of copper and other metals, and remained so engaged after the declaration of war and continuously to the present time.

III. Following the entry of the United States into the war, on the 6th day of April, 1917, the demand for copper for war purposes, already very great, was greatly enlarged, and the price of copper, until controlled by the Government, ruled materially above 23½ cents per pound.

On or about the 21st day of September, 1917, the Price-Fixing Committee of the War Industries Board recommended that  
2 the trading or selling price of copper be fixed at (23½ cents) twenty-three and one-half cents a pound, f. o. b., New York; such price to remain in effect until the 1st of January, 1918. Said recommendation was, on or about the same date, approved by the President of the United States and thereby became, by virtue of the powers vested in the President by the Constitution and Laws of the United States, the trading or selling price of copper, and all subsequent contracts or orders for the delivery of copper, whether by or between the Government of the United States and private industries or between private parties, were governed thereby.

On or about the 1st day of January, 1918, a new order was made by the same authority, whereby the same price was fixed, to prevail and continue until the 1st day of June, 1918. On that date it was provisionally extended, to not later than the 15th day of August, 1918.

On the 2nd day of July, 1918, however, the price of copper, so fixed, was changed by the same authority to twenty-six cents (26 cents) a pound, f. o. b. refinery, and the price so fixed remained in force and effect from and after the 2nd day of July, 1918, to the date of the armistice, November 11, 1918, and for some time thereafter.

The action of the President of the United States in thus prescribing the selling price of copper, as aforesaid, was taken by virtue and in pursuance of law, and all producers and sellers of copper were obliged to deliver, and claimant, in particular, did deliver, any copper on the basis of the prices fixed and controlled as aforesaid.

IV. Shortly after the United States, through its proper authorities, as set forth in the next preceding paragraph, first prescribed a fixed price for copper, the copper producers of the United States, at the request of the War Industries Board, a duly constituted agency of the Government, formed what was known as the "Copper Producers' Committee," with an office in New York and with a representative in Washington, which Committee, subject to the control and supervision of, and in co-operation with, the War Industries Board, distributed all orders for copper among the various copper producers in proportion to their respective outputs, and also allocated or distributed tonnages of copper available for delivery between the United States and other Governments as well as private industries, all in such manner as was best required in the public interests and as should best promote the vigorous and successful prosecution of the war. This Committee directed and prescribed that all orders for copper for the use of allied European Governments, whether under contracts or orders of any of those Governments or of the United States, should be filled through or by the claimant company, acting as a clearing house for copper producers, while all orders for copper for the use of the United States alone should be filled through another company, the United Metals Selling Company, likewise acting as a clearing or sales agency for producers. These directions and requirements continued and were followed during the entire time of active hostilities in the European War.

On the 14th day of March, 1918, the Ordnance Department of the United States Army, by its proper officers and acting under provisions of law applicable thereto, issued an order, serially numbered as "War Order P-4219-1788-A," directed to the United Metals Selling Company, a copy of which order is annexed to this petition as Exhibit "A." This order stated, by direction of the Chief of Ordnance—

"that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper—Prime Lake or Electrolytic—at a price of 23½ cents net per pound, f. o. b. New York basis."

Said order also provided:

"Deliveries to extend over a period of six months, and are to be made at the rate of 5,000 metric tons per month starting with March."

According to the terms of this order, deliveries would have continued through the months of March, April, May, June, July and August, 1918.

Said United Metals Selling Company acknowledged receipt of this order on the 19th day of March, 1918 (a copy of which letter of acknowledgment is annexed to this petition, marked Exhibit "B"), stating therein that it could not accept an order at the price of 23½ cents a pound for deliveries extending beyond June 1st, 1918, to which date only the price of 23½ cents a pound has been fixed by action of the President, and, therefore, requesting that the order be corrected, so as to call for only fifteen thousand (15,000) tons for the first three months—that is, to the first day of June—and, that if desired, another order be given for the remaining fifteen thousand (15,000) tons at whatever price should be determined later by the aforesaid price-fixing authorities of the Government.

The Ordnance Department replied to this letter on the 23rd of March, 1918, stating that the order would be amended so as to call for delivery of the whole thirty thousand (30,000) metric tons on or before the first of June, 1918 (a copy of which letter is hereto annexed, marked Exhibit "C").

Thereafter the Ordnance Department of the Army, on the 25th of March, 1918, wrote another letter to the United Metals Selling Company, giving directions that the copper shall be shipped in shapes specified by the French High Commission and stating how such copper should be inspected and what officers were to give directions as to shipments. A copy of said letter is hereto annexed, as Exhibit "D." Said letter (Exhibit "D") was brought to the knowledge of the claimant company at the time that it took over the fulfillment of the order and governed all productions and shipments made by the claimant company.

VI. The attention of the Copper Producers' Committee, hereinbefore referred to, was called to the fact that the copper which the Government was about to require, as set forth in the preceding paragraph was for the use of the French Government. Thereupon said Committee, with the full knowledge and approval of the officers of the Ordnance Department of the Army, directed that the order be filled by the American Smelting and Refining Company (the claimant in this case), as the proper clearing house or agency for export orders, instead of by the United Metals Selling Company, the clearing agency for domestic orders. Accordingly, on the 26th of March, 1918, the United Metals Selling Company informed the Ordnance Department that said order—P 4219-1788 A—should properly be directed to the American Smelting and Refining Company. A copy of the letter of the United Metals Selling Company, so informing the Ordnance Department, is hereto annexed, as Exhibit "E."

Thereupon, on the 28th day of March, 1918, the Ordnance Department wrote a letter to the claimant company, stating, by direction of the Chief of Ordnance—

"that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper at a price of 23½ cents per pound net f. o. b. New York basis. Deliveries are to be completed on or before June 1st, 1918."

A copy of this letter is hereto annexed, Marked Exhibit "F."

Immediately upon receipt of this letter or order and as soon as shipping instructions could be obtained, together with directions as to ships, as required by the order, the claimant company, knowing said order to be legally obligatory upon it under the laws of the United States, proceeded with all possible dispatch to obtain and furnish copper thereby called for.

By the 10th day of April there had been furnished and delivered a total of about two thousand five hundred (2,500) metric tons, and arrangements had been made for furnishing and delivering more than 5,000 tons additional in that month. No payment had up to that time been made for the tonnage delivered, for which nearly one million three hundred thousand dollars (\$1,300,000) was due and unpaid by the United States, and for which the producers of copper, for whom and in whose behalf, as well as for itself, the claimant company was acting, were pressing the claimant company to obtain payment from the Government and to account therefor to said producers respectively. Thereupon, on the 10th of April 1918, the Copper Producers' Committee, by its officially authorized representative in Washington, wrote a letter to the claimant company, based upon information obtained by said representative from the Ordnance Department of the United States Army, informing the claimant company that there would have to be a formal acceptance of the letter of the Ordnance Department before any payments could be made. A copy of said letter of April 10th, 1918, is annexed to this petition marked Exhibit "G."

7 To this letter the claimant company, on the 11th day of April, 1918, made a response to the representative of the Copper Producers' Committee, a copy of which letter is hereto annexed, marked Exhibit "H," and which inclosed a letter of acceptance, also dated April 11, 1918, to the Ordnance Department of the Army, a copy of which is hereto annexed, marked Exhibit "I."

Within said month of April the claimant company, by its Vice-President, had an interview with Mr. Pope Yeatman, Chairman of the Non-Ferrous Metals Section of the War Industries Board, in which he adopted and reiterated the protest originally made by the United Metals Selling Company, as contained in Exhibit "B" to this petition, dated March 19, 1918, and objected to having an order forced upon the producers for the delivery of 30,000 tons of copper by the first of June, when it was known that not one-half of that quantity could be delivered by that date, except by the displacement of other orders of equal and greater importance, and to thus being forced to accept the price of 23½ cents a pound for a large tonnage after the period to which that price was limited by presidential order had expired.

VII. The copper required by the United States under the orders hereinbefore set forth was desired for shipments to France, for use by the French Government, and was in part required to be in sizes and dimensions conforming to French measurements and usage, and not in sizes and dimensions customarily required or used in the United States. The claimant was directed, in the order given to it,

to consult the French High Commission and to obtain specific instructions from said Commission as to the sizes and dimensions required. It was also necessary in every case that the claimant company be furnished by the Ordnance Department of the United States Army with independent specification orders, confirming the specifications given by the French High Commission, and also with shipping instructions in detail, without which such copper could not be received or transported by the steamship companies, or by the railroads over whose lines it was to reach the several ports whence it was to be shipped to France.

The claimant company proceeded to furnish, and did furnish and deliver as promptly as possible upon receipt of specifications and shipping instructions, all the copper for which such specifications and shipping instructions were furnished by the French High Commission and by the United States. On or before June 1, 1918, the claimant had furnished and shipped a total of 23,314,085 pounds (10,575 metric tons), which was all the copper that could by possibility have been produced and shipped by that date on the specification orders and shipping instructions then received.

No portion of the 14,000 metric tons for which a specification order dated May 20, 1918, had been received could by any degree of effort or diligence have been produced and shipped by that date, having previously been demanded for delivery to mills in this country supplying munitions for the United States Government.

On the 27th day of June, 1918, the claimant company wrote a letter to Colonel Samuel McRoberts, Ordnance Department of the United States Army, stating its position to be that it was entitled to full settlement on all copper delivered prior to June 1, at twenty-three and one-half cents (23½ cents), and thereafter to such price as might be fixed by the Price-Fixing Committee and the producers, effective upon the date so fixed. A copy of said letter is hereto annexed, marked Exhibit "J."

On or before July 2, 1918, the claimant had furnished and shipped a further total of 19,916,895 pounds (9,034 metric tons), which was all the copper that could by possibility have been shipped by that time on the specification orders and shipping instructions then received (with the exception of 2,405,008 pounds (1,091 metric tons), which was not shipped until after that date, for good and sufficient reasons arising in part from lack of steamer space and in part because of the requirements of other orders for the benefit of the Government, but in respect to which no claim is made, or has been made. No portion of the remaining 20,500,620 pounds (9,299 metric tons) could by any degree of effort or diligence have been produced or delivered prior to July 2, 1918; but all of such remaining quantity was produced and delivered as promptly as possible at various times after said last mentioned date.

The above mentioned letter of June 27, 1918, was answered on the 1st day of July, 1918, by a letter of the Ordnance Department, stating that the Department is entitled to the delivery of the entire quantity of said copper at 23½ cents a pound. A copy of said letter is hereunto annexed, marked Exhibit "K."

VIII. Thereafter, on the 2nd day of July, 1918, the Price-Fixing Committee of the War Industries Board, in pursuance of authority lawfully vested in it and with the approval of the President of the United States, fixed the price of copper at twenty-six cents (26 cents) a pound, effective on and after said 2nd day of July.

On or about the same date, all questions then at issue or that might arise between the producers of copper and the United States, as to the price to be paid for copper, under existing contracts or orders, were referred by the Price-Fixing Committee of the War Industries Board to Mr. Pope Yeatman, Chairman, as aforesaid, of the Non-Ferrous Metals Section of the War Industries Board, and said Pope Yeatman was thereby authorized to act as umpire of such controversies. A hearing was thereupon held by said Pope Yeatman, at which the officers of the Ordnance Department of the Army and the officers of the claimant company respectively, appeared and stated fully their grounds for claiming—respectively—the officers of the Government that the price of 23½ cents should continue to prevail on deliveries effected after the 2nd day of July, 1918, and the officers of the claimant company that such deliveries should be at the price of 26 cents a pound.

Along with the question arising on the order to the claimant company was submitted to said Pope Yeatman, the question of the right of the United Metals Selling Company, hereinbefore referred to and representing the same producers of copper as the claimant company, but upon orders whereby such copper was to be furnished to the United States for its own use and affecting about two hundred millions of pounds of copper. Said Pope Yeatman, shortly after the 2nd day of July, 1918, after full hearings, decided, as to the order to the United Metals Selling Company for 200,000,000 pounds, that so much of said copper as was either delivered before the 2nd day of July, 1918, or as might, by the exercise of reasonable diligence on the part of said United Metals Selling Company or of the producers represented, have been delivered prior to said 2nd day of July, 1918, should be paid for at 23½ cents a pound, but that such as neither was, nor could have been, delivered by said 2nd day of July, 1918, and was delivered afterwards, should be paid for at the rate of twenty-six cents (26 cents) per pound. Said orders for 200,000,000 pounds

11 were accordingly settled and paid for on the principle so decided by said Yeatman. After the hearing had been closed, however, but before any formal decision could be rendered by him on the order to the claimant company, involved in the present case, the Ordnance Department of the Army, knowing of the rule and principle announced by him and with a view to prevent its being applied to the transaction herein involved, undertook to withdraw the controversy from his consideration, upon the ground or pretence that there was a complete and perfect contract between the claimant company and the United States for delivery of the entire amount of copper at 23½ cents a pound and that, therefore, there was no ground for arbitrating anything. A copy of the letter of the Ordnance Department, undertaking so to withdraw the controversy from the consideration of said Pope Yeatman, is annexed hereto as Exhibit "L."

A copy of said letter was transmitted to the claimant company by said Pope Yeatman by a letter of August 16, 1918, a copy of which is hereto annexed, Marked Exhibit "M."

On the same date the claimant company wrote a letter to the Procurement Division, Ordnance Office, War Department, stating that it was sending to the disbursing officer in New York various invoices covering shipments of copper made since July 2d, 1918, at 23½ cents per pound, but protesting against the payment of any less than 26 cents per pound, a copy of which letter is hereto annexed, marked Exhibit "N."

On the 11th day of September, 1918, the claimant company wrote to said Pope Yeatman, protesting against the action of the Ordnance Department, a copy of which letter is hereto annexed, marked Exhibit "O."

12 IX. Meanwhile from time to time and as fast as possible after specifications were furnished by the French High Commission and the Ordnance Department and shipping instructions could be received from the proper authorities of the Ordnance Department of the United States, the entire remaining quantity of copper covered by the order, to wit, twenty million five hundred thousand six hundred and twenty (20,500,620) pounds, were delivered by the claimant company, all after the 2nd day of July, 1918.

X. On or about the 10th day of June, 1918, the Ordnance Department submitted to the claimant company a form of contract, covering the transactions hereinbefore set forth, with the request that said contract be executed, with which request the claimant company declined for a long time to comply.

On the 7th day of October, 1918, at which time a large amount of money was due the claimant and was being withheld from it because the contract was not signed, the Ordnance Department wrote the claimant company a letter, a copy of which is hereunto annexed, marked Exhibit "P," requesting that the contract be returned or that the claimant arrange with the Procurement Division for the issuance of a procurement order which should be sufficient to support payments until the formal contract should be executed. In response to this letter, on the 8th day of October, 1918, claimant wrote the Ordnance Department, transmitting copy of the letter or order of March 28th, 1918, hereinbefore referred to and annexed to this petition as Exhibit "E" (a copy of which letter is hereto annexed, marked Exhibit "Q"). In response to this letter the claimant was informed, by a letter of the Finance Division of the Ordnance

13 Department, dated October 14th, 1918, that said letter of March 28th was not a procurement order at all, and transmitted to the claimant a communication from the Ordnance Department at Washington, stating that the Legal Section, Procurement Division, advised that office that there was no record of a procurement order and that the contract had not been signed. Said communication from the Ordnance Department at Washington, dated October 4th, 1918, is hereto annexed, marked Exhibit "R," and said letter from the Finance Division of the Ordnance Depart-



ment, dated October 14th, 1918, is hereto annexed, marked Exhibit "S."

This letter was answered by the claimant company under date of October 16th, 1918, addressed to the Ordnance Department at Washington, a copy of said letter being hereto annexed, marked Exhibit "T." This letter was replied to on the 30th day of October, 1918, by the Ordnance Department by letter addressed to the claimant company, a copy of which letter is hereto annexed, marked Exhibit "U."

XI. Thereafter the United States Government, by its authorities, continually refused to make any payments until the claimant should execute a contract in due form which would be sufficient to support payments, and transmitted to the claimant company a form of contract, purporting to have been signed and executed on the 28th day of March, 1918, but which was not, in fact, executed on that date and which the claimant, long after the delivery of all the copper covered by the original order, executed and signed under protest and with express reservations. A copy of said contract or instrument in the form of a contract, and purporting to be dated March 28th, 1918, was signed by the Company on or about the 13th day of January, 1919, and a copy thereof is hereunto annexed, 14 Marked Exhibit "V." A copy of the protest and reservations, dated January 13, 1919, is hereto annexed, marked Exhibit "W." The receipt of this contract was acknowledged by letter of the Ordnance Department, dated January 14th, 1919, a copy of which is hereto annexed, marked Exhibit "X." The claimant company, by letter of January 17th, 1919 (a copy of which is hereto annexed, marked Exhibit "Y"), wrote the Ordnance Department of the Army, requesting that due note be taken of the fact that, contemporaneously with the delivery on behalf of the Company of the executed contract, there was delivered to the contracting officer of the Department the company's letter, dated January 13th, 1919, stating its protests and reservations. This letter was answered by the Ordnance Department of the Army, under date of January 22nd, 1919, a copy of which is hereto annexed, marked Exhibit "Z," acknowledging the receipt and filing of the claimant company's protest.

XII. Thereafter the claimant company was paid at the rate of 23½ cents a pound for all the balance of the copper for which it had not been previously paid.

XIII. By the National Defense Act of June 3, 1916 (Chapter 134, Sec. 120, 39 Stat., 213), compliance with all orders for products or material is made obligatory. The refusal to comply therewith is made a criminal offense, punishable by fine and imprisonment and the seizure of the plant of the manufacturer of such products or material, and it is provided by said section that the compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material shall be fair and just. The price of twenty-six (26) cents a pound was,



15 from and after the 2nd day of July, 1918, the fair and just compensation for copper and was so fixed by competent authority, as aforesaid.

XIV. Under the provisions of law and executive order, and particularly of the act of March 2, 1919 (Chapter 94, Section 1, 40 Stat., 1272), there was constituted within the War Department a Board of Contract Adjustment, for the consideration and settlement of all war contracts, orders, or agreements, whether formal or informal, and to said Board claimant submitted its claim. Said claim was, by said Board, disallowed, whereupon the claimant appealed to the Secretary of War from said disallowance. The decision of said Board was, by said Secretary, affirmed.

XV. By Section 2 of the same Act, jurisdiction is given to this court to find and award fair and just compensation due on any such war contracts, orders or agreements, whether formal or informal, and by Section 145 of the Judicial Code of March 3, 1911 (Chapter 231, 36 Stat., 1136), this court also has jurisdiction of all claims founded upon any contract, expressed or implied, with the Government of the United States, as well as of all claims founded upon the Constitution of the United States, and claimant relies upon the Fifth Amendment to the Constitution of the United States, providing that private property shall not be taken for public use without just compensation.

XVI. The claimant corporation and its officers are citizens of the United States and have at all times borne true faith and allegiance to the Government of the United States. The claimant is the owner of this claim and no assignment or transfer thereof has been made otherwise than as herein stated.

16 XVII. The claimant prays judgment as follows:

20,500,620 pounds of copper at 26 cents a pound . . .	\$5,330,161.20
Less payments received at 23½ cents per pound . . .	4,817,645.70
Balance . . . . .	\$512,515.50

KING & KING,  
*Attorneys for Claimant.*

GEORGE A. KING,  
CHARLES EARL,  
*Of Counsel.*

STATE OF NEW YORK.  
*County of New York, ss:*

Joseph Clendenin, being duly sworn, deposes and says: I am Vice-President of American Smelting and Refining Company, claimant herein; I have read the above petition and the facts therein stated are true, to the best of my knowledge and belief.

JOSEPH CLENDENIN.

Subscribed and sworn to before me this 10th day of May, 1920.  
S. KALÉSCHER,  
*Notary Public.*

Exhibits A to Z inclusive, at end of amended petition, post, p. 45.

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## II. *Demurrer.*

(Filed July 23, 1920.)

The United States, by its Attorney General, demurs to the petition filed herein May 28, 1920, on the ground that the same does not state facts sufficient in law to constitute a cause of action.

Dated July 23, 1920.

FRANK DAVIS, JR.,  
*Assistant Attorney General.*

J. ROBERT ANDERSON,  
CROWLEY WENTWORTH,  
*Special Assistants to the Attorney General.*

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## III. *Argument and Submission on Demurrer.*

October 11, 1920.

Argued and submitted on demurrer by Mr. George A. King for the claimant and Messrs. Crowley Wentworth & J. Robt. Anderson for the defendants.

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## IV. *Opinion.*

(Filed October 25, 1920.)

Court of Claims of the United States.

No. 34621.

AMERICAN SMELTING AND REFINING COMPANY

v.

THE UNITED STATES.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the American Smelting and Refining Company against the United States to recover the sum of \$512,515.50. The United States has demurred to the petition.

The petition alleges that the plaintiff is a corporation organized under the laws of New Jersey, having an office in the city of New York, and that it and its officers are citizens of the United States and have at all times borne true faith and allegiance to the Government of the United States; and that it owns the claim sued on, and that no assignment or transfer of the same has been made.

The petition further alleges that for a long time preceding the declaration of war with Germany on the 6th day of April, 1917, the plaintiff company had been engaged in the production, sale, and distribution of copper, and remained so engaged after the declaration of war and up to the present time; that on the 21st day of September, 1917, the President of the United States, by virtue of the authority vested in him by the Constitution and laws of the United States, fixed the price of copper at twenty-three and one-half cents a pound, f. o. b. New York; such price to remain in effect until the first day of January, 1918. On the first day of January, 1918, the President of the United States entered an order fixing the same price for copper until the first day of June, 1918. On the second day of July, 1918, the price of copper was fixed by the President at 26 cents per pound, f. o. b. refinery, and that price remained so fixed until the date of the armistice, November 11, 1918.

The petition further alleges that shortly after the price of copper was fixed by the President the copper producers of the country, at the request of the War Industries Board, formed the Copper Producers' Committee, with an office both in New York and Washington, which committee, subject to the control of and in cooperation with the War Industries Board, distributed all orders for copper among the copper producers. This committee directed that all orders for copper for the use of allied Governments should be filled through or by the plaintiff, and that all orders for copper for the  
20 United States should be filled through or by the United Metals Selling Company.

The petition further alleges that the Ordnance Department of the United States Army sent to the United Metals Selling Company the following, dated March 14, 1918: "That the Procurement Division is prepared to procure from you 30,000 metric tons (163,138,000 pounds) of copper, Prime Lake or Electrolytic, at a price of 23½ cents net per pound, f. o. b. New York basis." This letter also provided for deliveries to extend over a period of six months, 5,000 metric tons per month beginning with March. The United Metals Selling Company replied on March 19, 1918, that it could not accept the order at the price of 23½ cents per pound for deliveries extending beyond June 1, 1918, to which date only the price of 23½ cents per pound was fixed, and requested a change in the order.

The Ordnance Department on March 23, 1918, replied to the foregoing letter, amending the former letter so as to call for delivery of 30,000 metric tons of copper to be delivered on or before June 1, 1918, and on March 25, 1918, the Ordnance Department advised the United Metals Selling Company that it wished the copper shipped to France.

The Copper Producers' Committee directed that the copper so ordered by the Ordnance Department should be filled by the plaintiff, and on March 28, 1918, the Ordnance Department wrote a letter to the plaintiff as follows: "That the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper at a price of 23½ cents per pound net, f. o. b. New York basis. Deliveries are to be completed on or before June 1st, 1918." After

some intermediate correspondence the plaintiff wrote the following letter to the Ordnance Department, dated April 11, 1918: "We have your favor March 28, under the above reference number, and take pleasure in accepting your letter as above, pending issuance of formal contract, which we hope to receive in the near future."

The petition further alleges that the plaintiff furnished and delivered as promptly as possible upon receipt of specifications and shipping instructions all the copper for which such specifications and shipping instructions were furnished by the French High Commission and the United States, and on or before June 1, 1918, had furnished and shipped a total of 10,575 metric tons, which the petition alleges was all the copper that could by possibility have been produced and shipped by that date on the specification orders and shipping instructions then received. It also appears that the plaintiff on May 2, 1918, requested to be allowed to continue deliveries beyond June 1, 1918.

The petition further alleges that on June 27, 1918, the plaintiff advised the Ordnance Department that its position was that it was entitled to full settlement on all copper delivered prior to June 1, at 23½ cents a pound, and thereafter to such price as might be fixed by the Price Fixing Committee and the producers, effective upon the date so fixed. This letter was answered by the Ordnance Department July 1, 1918, and the plaintiff was advised that the department was entitled to the delivery of the entire quantity of copper at 23½ cents a pound.

21 On or before July 2, 1918, the plaintiff had furnished and shipped 20,701 metric tons of copper. The petition alleges that no portion of the remaining 9,299 metric tons (20,500,620 pounds) of copper could by any degree of effort or diligence have been produced or delivered prior to July 2, 1918, but the remaining quantity was produced and delivered after July 2, 1918.

On July 2, 1918, the President fixed the price of copper at 26 cents a pound, effective on that day. About the same date all questions then at issue between the producers of copper and the United States as to the price of copper to be paid under existing contracts or orders were referred to Mr. Pope Yeatman, who was authorized to act as umpire of such controversies. A hearing was held by said Pope Yeatman, at which the officers of the Ordnance Department and the officers of the plaintiff appeared. After the hearing had been closed, but before any decision had been rendered, the officers of the Ordnance Department withdrew the controversy from Mr. Pope Yeatman on the ground that there was a complete and perfect contract between the plaintiff and the United States.

On August 16, 1918, the plaintiff wrote a letter to the Ordnance Department stating that it was sending to the disbursing officer in New York invoices covering shipments of copper made since July 2, 1918, at 23½ cents a pound, but protesting against the payment of any less than 26 cents a pound. And the plaintiff also protested to Pope Yeatman against the action of the Ordnance Department.

It is further alleged that the Ordnance Department submitted to the plaintiff a form of contract covering the transactions above men-

tioned, but it was not until the 13th day of January, 1919, that the plaintiff signed the contract, which was dated March 28, 1918. The Government refused to pay the amount of money due the plaintiff until the formal contract was signed. Considerable correspondence was had between the parties between the 10th of June, 1918, and January 13, 1919, all of which correspondence appears in Exhibits P, Q, R, S, T, and U, filed with petition of the plaintiff. When the plaintiff signed the contract it filed therewith a letter, in which it protested that it was entitled to receive 26 cents a pound for all copper furnished by it after July 2, 1918, and it protested against the action of the Ordnance Department in refusing to pay 26 cents a pound for the copper so furnished, and reserved the right to take such action as it might be advised was necessary to protect its alleged rights and interests. After signing said contract the plaintiff was paid for the copper furnished by it since July 1, 1918, at the rate of  $23\frac{1}{2}$  cents a pound, which amounted to the sum of \$4,817,-645.70, which was \$512,515.50 less than it claims should have been paid. The plaintiff under the provisions of the act of March 2, 1919, submitted its claim to the Board of Contract Adjustment. This board disallowed the claim, and its decisions was approved by the Secretary of War.

Upon the foregoing facts the plaintiff claims that it is entitled to judgment against the defendants in the sum of \$512,515.50 and relies upon the fifth amendment to the Constitution and section 120 of the act of June 3, 1916 (39 Stat., 213).

The defendants insist that the procurement order of March 28, 1918, and the plaintiff's acceptance thereof constitute a contract. If this construction is correct, then the plaintiff can not rely upon section 120 of the act of June 3, 1916, nor upon the provisions of the fifth amendment to the Constitution.

It appears from the allegations of the petition that the plaintiff, upon demanding payment for the copper which it was delivering, was advised that no payment could be made by the Government until the plaintiff accepted in writing the proposal made to it by the Government. Whereupon the plaintiff on April 11, 1918, accepted the proposal of the Government to furnish and deliver 30,000 metric tons of copper at  $23\frac{1}{2}$  cents per pound on or before June 1, 1918. Had the procurement order of the Government been made in pursuance of the provisions of section 120 of the act of June 3, 1916, no acceptance of said order or proposal would have been necessary, nor would the Government have demanded such acceptance before making payment. Where one party makes an offer to another by letter, and the party to whom the letter is addressed prepares and mails his answer accepting the proposal, a contract is made between the parties, and is binding upon them. *Adams v. United States*, 1 C. Cls., 192-194. The letter written by the Ordnance Department to the plaintiff was a proposal that the plaintiff should furnish and deliver a certain amount of copper at a certain price within a certain time; the acceptance of that proposal in writing by the plaintiff completed the transaction, and the proposal and acceptance together constituted a contract between the parties, and from the instant of the

acceptance of the proposal there was a full and distinct accord between them. The plaintiff's protests and reservations made when it signed the formal contract, long after the contract was completed, are of no effect. Nor could the plaintiff raise the price of the article which it was furnishing at agreed prices by complaining that the price of the article since the contract was made had advanced, even though the advanced price was fixed by one of the parties to the contract. If the Government had fixed the price on July 2, 1918, at 20 cents instead of 26 cents a pound we do not think the Government could successfully maintain that it should pay only 20 cents when by contract it had agreed to pay 23½ cents a pound.

As we think the writings between the parties constitute a contract it is not necessary to discuss the question raised in the petition that the procurement order of March 28, 1918, was obligatory upon the plaintiff under section 120 of the act of June 3, 1916, further than to say that the so-called procurement order does not purport to be a requisition nor to have been issued under the provisions of the act referred to. Nor has the plaintiff presented a case which entitles it to recover under the provisions of the fifth amendment to the Constitution. Nothing was taken from the plaintiff; the compensation which it received was fixed by the provisions of a contract into which it voluntarily entered.

It is difficult to understand how the plaintiff can derive any benefit from the price-fixing order of July 2, 1918. Having entered into a contract to furnish and deliver a certain article at a certain price the fixing of another price upon the article by the Government does not in any way affect the particular contract of the plaintiff. *Deming v. United States*, 1 C. Cls., 190, 191.

For the reasons given the demurrer of the defendants to the petition of the plaintiff is sustained, and the petition is dismissed.

23

### *V. Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 25th day of October, 1920, judgment was ordered to be entered as follows:

In this case the Court rendered judgment with an opinion by Judge Hay.

Upon due consideration of the premises it is ordered, adjudged and decreed that the defendants' demurrer herein be sustained, and that the claimant's petition be and it hereby is dismissed.

By THE COURT.

24

### *VI. Order Setting Aside Judgment and Allowing Amended Petition to be Filed.*

(Filed November 15, 1920.)

This cause was submitted upon motion by plaintiff to set aside the final judgment entered therein on the 25th of October, 1920, dismissing the petition and the motion states that its sole object is to enable the plaintiff to file an amended petition in pursuance of Rule 30.

On consideration whereof it is ordered that the final judgment dismissing the petition in this cause be and the same is set aside and vacated and plaintiff is granted until the 1st day of December, 1920, within which time it may file an amended petition in this cause.

25

### VII. *Amended Petition.*

Original Petition Filed May 28, 1920.

Amended Petition Filed November 27, 1920.

To the Honorable the Court of Claims:

The claimant, American Smelting and Refining Company, respectfully represents:

I. The claimant is a corporation organized under the laws of the State of New Jersey, having an office for the transaction of business at No. 120 Broadway, in the City and State of New York.

II. For a long time preceding the declaration of war with Germany on the 6th day of April, 1917, the claimant company had been engaged in the production, sale and distribution of copper and other metals, and remained so engaged after the declaration of war and continuously to the present time.

III. Following the entry of the United States into the war, on the 6th day of April, 1917, the demand for copper for war purposes, already very great, was greatly enlarged, and the price of copper, until controlled by the Government, ruled materially above 23½ cents per pound.

On or about the 21st day of September, 1917, the Price-Fixing Committee of the War Industries Board, said board being at that time a subordinate agency of the Council of National Defense created by the act of August 29, 1916, Sec. 2 (39 Stat. 649) fixed the price of copper at 23½ cents a pound. Its action as officially announced is as follows:

"After investigation by the Federal Trade Commission as to the cost of producing copper, the President has approved an agreement made by the War Industries Board with the copper producers fixing a price of 23½ cents per pound, f. o. b. New York, subject to revision after four months."

It was also officially announced by said War Industries Board at the same time:

"The principal copper producers throughout the country have evinced an admirable spirit, and for weeks have promptly supplied every request of the Government for copper without awaiting decision as to price and agreeing to accept the price which the board should ultimately fix. The proper departments of the Government

will be asked to take over the mines and plants of any producers who fail to conform to the arrangement and price, if any such there should be."

The price so fixed thereby became by virtue of the powers vested in the President by the Constitution and laws of the United States, the trading or selling price of copper, and all subsequent contracts or orders for the delivery of copper, whether by or between the government of the United States and private industries or between private parties were governed thereby.

On or about the 1st day of January, 1918, a new order was made by the same authority, whereby the same price was fixed, to prevail and continue until the 1st day of June, 1918.

On the 4th day of March, 1918, the President by letter to  
27 Bernard M. Baruch, Chairman of said War Industries Board, conferred independent authority upon said Board, and provided that the duties of said Board should include among others "advice to the several purchasing agencies of the Government with regard to the price to be paid." He further stated: "The ultimate decision of all questions excepting the determination of price should rest always with the Chairman." "In the determination of prices the Chairman should be governed by the advice of a committee consisting, besides himself, of the members of the Board immediately charged with the study of raw materials and of manufactured products," etc.

On the 28th day of May, 1918, the President by formal executive order provided: "I hereby establish the War Industries Board as a separate administrative agency to act for me and under my direction." He at the same time, by said order specifically confirmed and continued in full force and effect the letter of March 4, 1918, to Bernard M. Baruch, Chairman of the War Industries Board hereinbefore referred to.

On the 2d day of July, 1918, the price of copper was again fixed by order of the War Industries Board, approved by the President, by the following order officially announced:

"The War Industries Board authorizes the following: Subject to the approval of the President, the price-fixing committee of the War Industries Board, in conference with representatives of the industry, today (July 2) fixed the price of copper at 26 cents per pound, an advance from 23½ cents, the price formerly fixed."

The price so fixed remained in force and effect from and after the 2d day of July, 1918, to the date of the armistice, November 11, 1918, and for some time thereafter.

28 The action of the President of the United States in thus prescribing the selling price of copper, as aforesaid, was taken by virtue and in pursuance of law, and all producers and sellers of copper were obliged to deliver, and claimant, in particular, did deliver, any copper on the basis of the prices fixed and controlled as aforesaid.



IV. Shortly after the United States, through its proper authorities, as set forth in the next preceding paragraph, first prescribed a fixed price for copper, the copper producers of the United States, at the request of the War Industries Board, a duly constituted agency of the Government, formed what was known as the "Copper Producers' Committee," with an office in New York and with a representative in Washington, which Committee, subject to the control and supervision of, and in co-operation with, the War Industries Board, distributed all orders for copper among the various copper producers in proportion to their respective outputs, and also allocated or distributed tonnages of copper available for delivery between the United States and other Governments as well as private industries, all in such manner as was best required in the public interests and as should best promote the vigorous and successful prosecution of the war. This Committee directed and prescribed that all orders for copper for the use of allied European governments, whether under contract or orders of any of those Governments or of the United States, should be filled through or by the claimant company, acting as a clearing house for copper producers, while all orders for copper for the use of the United States alone should be filled through another company, the United Metals Selling Company, likewise acting as a clearing or sales agency for producers.

29 These directions and requirements continued and were followed during the entire time of active hostilities in the European War.

V. On the 14th day of March, 1918, the Ordnance Department of the United States Army, by its proper officers and acting under provisions of law applicable thereto, and particularly, under the provisions of Sec. 120 of an Act for making further and more effectual provision for the national defense, and for other purposes, approved June 3, 1916 (Chapter 134, 39 Stat. 213), issued an order serially numbered as "War Order P—4219-1788—A," directed to the United Metals Selling Company, a copy of which order is annexed to this petition as Exhibit "A." This order stated, by direction of the Chief of Ordnance—

"that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper—Prime Lake or Electrolytic—at a price of 23½ cents net per pound, f. o. b. New York basis."

Said order also provided:

"Deliveries to extend over a period of six months, and are to be made at the rate of 5,000 metric tons per month starting with March."

According to the terms of this order, deliveries would have continued through the months of March, April, May, June, July and August, 1918.

Said United Metals Selling Company acknowledged receipt of this order on the 19th day of March, 1918 (a copy of which letter of acknowledgement is annexed to this petition, marked Exhibit "B"), stating therein that it could not accept an order at the price of 23½ cents a pound for deliveries extending beyond June 1st, 1918 to which date only the price of 23½ cents a pound had been fixed by action of the President, and, therefore, requesting that the order be corrected so as to call for only fifteen thousand (15,000) tons for the first three months—that is, to the first day of June—and, that if desired, another order be given for the remaining fifteen thousand (15,000) tons at whatever price should be determined later by the aforesaid price-fixing authorities of the Government.

The Ordnance Department replied to this letter on the 23rd of March, 1918, stating that the order would be amended so as to call for delivery of the whole thirty thousand (30,000) metric tons on or before the first of June, 1918 (a copy of which letter is hereto annexed marked Exhibit "C").

Thereafter the Ordnance Department of the Army, on the 25th of March, 1918, wrote another letter to the United Metals Selling Company, giving directions that the copper shall be shipped in shapes specified by the French High Commission and stating how such copper should be inspected and what officers were to give directions as to shipments. A copy of said letter is hereto annexed, as Exhibit "D." Said letter (Exhibit "D") was brought to the knowledge of the claimant company at the time that it took over the fulfillment of the order and governed all productions and shipments made by the claimant company.

VI. The attention of the Copper Producers' Committee, hereinbefore referred to, was called to the fact that the copper which the Government was about to require, as set forth in the preceding paragraph, was for the use of the French Government. Thereupon said Committee, with the full knowledge and approval of the officers of the Ordnance Department of the Army, directed that the order be filled by the American Smelting and Refining Company (the claimant in this case), as the proper clearing house or agency for export orders, instead of by the United Metals Selling Company, the clearing agency for domestic orders. Accordingly, on the 26th of March, 1918, the United Metals Selling Company informed the Ordnance Department that said order—P 4219-1788 A—should properly be directed to the American Smelting and Refining Company. A copy of the letter of the United Metals Selling Company, so informing the Ordnance Department, is hereto annexed, as Exhibit "E."

Thereupon on the 28th day of March, 1918, the Ordnance Department, acting under provisions of law applicable thereto, and particularly under the provisions of Sec. 120 of an Act for making further and more effectual provision for the national defense, and for other purposes, approved June 3, 1916 (Chapter 134, 39 Stat. 213), wrote a letter to the claimant company, stating, by direction of the Chief of Ordnance:

that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper at a price of 23½ cents per pound net f. o. b. New York basis. Deliveries are to be completed on or before June 1st, 1918."

A copy of this letter is hereto annexed, marked Exhibit "F."

Immediately upon receipt of this letter or order and as soon as shipping instructions could be obtained, together with directions as to ships, as required by the order, the claimant company, knowing said order to be legally obligatory upon it under the laws of the United States, proceeded with all possible dispatch to obtain and furnish the copper thereby called for.

By the 10th day of April there had been furnished and delivered a total of about two thousand five hundred (2,500) metric tons, and arrangements had been made for furnishing and delivering more than 5,000 tons additional in that month. No payment had up to that time been made for the tonnage delivered, for which nearly one million three hundred thousand dollars (\$1,300,000) was due and unpaid by the United States, and for which the producers of copper, for whom and in whose behalf, as well as for itself, the claimant company was acting, were pressing the claimant company to obtain payment from the Government and to account therefor to said producers respectively. Thereupon, on the 10th of April, 1918, the officially authorized representative in Washington of the Copper Producers' Committee wrote a letter to the claimant company based on information obtained by said representative from the Ordnance Department of the United States Army, calling attention to the absence of any reply by the claimant company to the Department's letter of March 28, 1918, and stating that the acceptance of that letter, which had been asked for by the Department, would "constitute a part of the record which would have to be completed before any payments can be made." A copy of said letter of April 10th, 1918, is annexed to this petition marked Exhibit "G."

To this letter the claimant company, on the 11th day of April, 1918, made a response to the representative of the Copper Producers' Committee, a copy of which letter is hereto annexed, marked Exhibit "H," and which inclosed a letter of acceptance, also dated April 11, 1918, to the Ordnance Department of the Army, a copy of which is hereto annexed, marked Exhibit "I."

Within said month of April, and again in the month of May, 1918, the claimant company, by its Vice-President, had an interview with Mr. Pope Yeatman, Chairman of the Non-Ferrous Metals Section of the War Industries Board, in which he adopted and reiterated the protest originally made by the United Metals Selling Company, as contained in Exhibit "B" to this petition, dated March 19, 1918, and objected to having an order forced upon the producers for the delivery of 30,000 tons of copper by the first of June, when it was known that not one-half of that quantity could be delivered by that date, except by the displacement of other orders of equal and greater importance, and to thus being

forced to accept the price of 23½ cents a pound for a large tonnage after the period to which that price was limited by Presidential order had expired.

VII. The copper required by the United States under the orders hereinbefore set forth was desired for shipments to France, for use by the French Government, and was in part required to be in sizes and dimensions conforming to French measurements and usage, and not in sizes and dimensions customarily required or used in the United States. The claimant was directed, in the order given to it, to consult the French High Commission and to obtain specific instructions from said Commission as to the sizes and dimensions required. It was also necessary in every case that the claimant company be furnished by the Ordnance Department of the United States Army with independent specification orders, confirming the specifications given by the French High Commission, and also with shipping instructions in detail, without which such copper could not be received or transported by the steamship companies, or by the railroads over whose lines it was to reach the several ports whence it was to be shipped to France.

The claimant company proceeded to furnish, and did furnish and deliver as promptly as possible upon receipt of specifications and shipping instructions, all the copper for which such specifications and shipping instructions were furnished by the French High Commission and by the United States. On or before June 1, 1918, the claimant had furnished and shipped a total of 23,314,085 pounds (10,575 metric tons), which was all the copper that could by possibility have been produced and shipped by that date on the specification orders and shipping instructions then received.

No portion of the 14,000 metric tons for which a specification order dated May 20, 1918, had been received could by any degree of effort or diligence have been produced and shipped by that date (June 1, 1918), having previously been demanded for delivery to mills in this country supplying munitions for the United States Government.

The 18th day of April, 1918, the Ordnance Department of the Army transmitted to the claimant company a blank contract to be executed by the claimant providing for the delivery of the entire 30,000 metric tons or 66,138,000 pounds of refined copper, beginning on the 1st of March, 1918, and to be completed on or before June 1, 1918. The claimant company not being satisfied with the terms of said contract and knowing that the delivery of such a large amount of copper by the first of June, 1918, was impossible and that it was not really desired by the Ordnance Department of the Army, objected to executing said contract, but was again requested in writing by the Ordnance Department of the Army by letter of May 31, 1918, to execute the contract as requested, but still refused to do so.

On the 10th day of June, 1918, the claimant company was again

35 requested in writing by the Ordnance Department of the Army to sign and return to the department the blank contracts previously transmitted to it.

On June 11, 1918, a contract in amended form was transmitted by the Ordnance Department of the Army to the claimant company, said contract still bearing date as of March 28, 1918; and the company was again requested by said Ordnance Department to execute and return said contract.

On the 27th day of June, 1918, the claimant company wrote a letter to Colonel Samuel McRoberts, Ordnance Department of the United States Army, stating its position to be that it was entitled to full settlement on all copper delivered prior to June 1, at twenty-three and one-half cents ( $23\frac{1}{2}$  cents), and thereafter to such price as might be fixed by the Price-Fixing Committee and the producers, effective upon the date so fixed. A copy of said letter is hereto annexed, marked Exhibit "J."

On or before July 2, 1918, the claimant had furnished and shipped a further total of 19,916,895 pounds (9,034 metric tons), which was all the copper that could by possibility have been shipped by that time on the specification orders and shipping instructions then received, with the exception of 2,405,008 pounds (1,091 metric tons), which was not shipped until after that date, for good and sufficient reasons arising in part from lack of steamer space and in part because of the requirements of other orders for the benefit of the Government, but in respect to which no claim is made, or has been made. No portion of the remaining 20,500,620 pounds (9,299 metric tons) could by any degree of effort or diligence have been produced or delivered prior to July 2, 1918; but all of such remaining quantity was produced and delivered as promptly as possible at various times after said last mentioned date.

36 The above mentioned letter of June 27, 1918, was answered on the 1st day of July, 1918, by a letter of the Ordnance Department, stating that the Department is entitled to the delivery of the entire quantity of said copper at  $23\frac{1}{2}$  cents a pound. A copy of said letter is hereunto annexed, marked Exhibit "K."

VIII. Thereafter, on the 2d day of July, 1918, as hereinbefore set forth, the Price-Fixing Committee of the War Industries Board, in pursuance of authority lawfully vested in it and with the approval of the President of the United States, fixed the price of copper at twenty-six cents (26 cents) a pound, effective on and after said 2d day of July.

On or about the same date, all questions then at issue or that might arise between the producers of copper and the United States, as to the price to be paid for copper, under existing contracts or orders, were referred by the Price-Fixing Committee of the War Industries Board to Mr. Pope Yeatman, Chairman, as aforesaid, of the Non-Ferrous Metals Section of the War Industries Board, and said Pope Yeatman was thereby authorized to act as umpire of such controversies. A hearing was thereupon held by said Pope Yeatman, at which the officers of the Ordnance Department of the Army and the officers of the claimant company, respectfully, appeared and stated fully their grounds for claiming—respectively—the officers

of the Government that the price of 23½ cents should continue to prevail on deliveries effected after the 2d day of July, 1918, and the officers of the claimant company that such deliveries should be at the price of 26 cents a pound.

Along with the question arising on the order to the claimant company was submitted to said Pope Yeatman the question of the right of the United Metals Selling Company, hereinbefore referred to and representing the same producers of copper as the claimant company, but upon orders whereby such copper was to be furnished to the United States for its own use and affecting about two hundred millions of pounds of copper. Said Pope Yeatman, shortly after the 2d day of July, 1918, after full hearings, decided, as to the order to the United Metals Selling Company for 200,000,000 pounds, that so much of said copper as was either delivered before the 2d day of July, 1918, or as might, by the exercise of reasonable diligence on the part of said United Metals Selling Company or of the producers represented, have been delivered prior to said 2d day of July, 1918, should be paid for at 23½ cents a pound, but that such as neither was, nor could have been, delivered by said 2d day of July, 1918, and was delivered afterwards, should be paid for at the rate of twenty-six cents (26 cents) per pound. Said orders for 200,000,000 pounds were accordingly settled and paid for on the principle so decided by said Yeatman. After the hearing had been closed, however, but before any formal decision could be rendered by him on the order to the claimant company, involved in the present case, the Ordnance Department of the Army, knowing of the rule and principle announced by him and with a view to prevent its being applied to the transaction herein involved, undertook to withdraw the controversy from his consideration upon the ground or pretence that there was a complete and perfect contract between the claimant company and the United States for delivery of the entire amount of copper at 23½ cents a pound and that, therefore, there was no ground for arbitrating anything. A copy of the letter of the Ordnance Department, undertaking so to withdraw the controversy from the consideration of said Pope Yeatman, is annexed hereto as Exhibit "L."

38 A copy of said letter was transmitted to the claimant company by said Pope Yeatman by a letter of August 16, 1918, a copy of which is hereto annexed, marked Exhibit "M."

On the same date the claimant company wrote a letter to the Procurement Division, Ordnance Office, War Department, stating that it was sending to the disbursing officer in New York various invoices covering shipments of copper made since July 2, 1918, at 23½ cents per pound, but protesting against the payment of any less than 26 cents per pound, a copy of which letter is hereto annexed, marked Exhibit "N."

On the 11th day of September, 1918, the claimant company wrote to said Pope Yeatman, protesting against the action of the Ordnance Department, a copy of which letter is hereto annexed, marked Exhibit "O."

IX. Meanwhile from time to time and as fast as possible after specifications were furnished by the French High Commission and the Ordnance Department and shipping instructions could be received from the proper authorities of the Ordnance Department of the United States, the entire remaining quantity of copper covered by the order, to wit, twenty million five hundred thousand six hundred and twenty (20,500,620) pounds, were delivered by the claimant company, all after the 2d day of July, 1918.

X. On or about the 10th day of June, 1918, the Ordnance Department submitted to the claimant company a form of contract, covering the transactions hereinbefore set forth, with the request that said contract be executed, with which request the claimant company declined for a long time to comply.

On the 7th day of October, 1918, at which time a large amount of money was due the claimant and was being withheld from  
39 it because the contract was not signed, the Ordnance Department wrote the claimant company a letter, a copy of which is hereunto annexed, marked Exhibit "P," requesting that the contract be returned or that the claimant arrange with the Procurement Division for the issuance of a procurement order which should be sufficient to support payments until the formal contract should be executed. In response to this letter, on the 8th day of October, 1918, claimant wrote the Ordnance Department, transmitting copy of the letter or order of March 28, 1918, hereinbefore referred to and annexed to this petition as Exhibit "E" (a copy of which letter is hereto annexed, marked Exhibit "Q"). In response to this letter the claimant was informed, by a letter of the Finance Division of the Ordnance Department, dated October 14, 1918, that said letter of March 28th was not a procurement order at all, and transmitted to the claimant a communication from the Ordnance Department at Washington, stating that the Legal Section, Procurement Division, advised that office that there was no record of a procurement order and that the contract had not been signed. Said communication from the Ordnance Department at Washington, dated October 4, 1918, is hereto annexed, marked Exhibit "R," and said letter from the Finance Division of the Ordnance Department, dated October 14, 1918, is hereto annexed, marked Exhibit "S."

This letter was answered by the claimant company under date of October 16, 1918, addressed to the Ordnance Department at Washington, a copy of said letter being hereto annexed, marked Exhibit "T." This letter was replied to on the 30th day of October, 1918, by the Ordnance Department by letter addressed to the claimant company, a copy of which letter is hereto annexed, marked Exhibit  
"U."

40 The last delivery of copper in connection with the order in question was made on or before November 15, 1918, and amounted to 433,483 pounds. Various quantities of copper, ranging from 65,018 pounds to 1,037,903 pounds in amount, had been delivered on various dates, 33 in number, between July 31, 1918, and November 15, 1918, the date of the last delivery. This copper



consisted entirely of Calumet & Hecla billets. The reason why deliveries continued to so late a date is that these billets had to be cast in special molds, which had first to be expressly made in millimeter sizes to conform to French specifications. It was a practical impossibility first to make the molds and then to cast the billets, with the output limited by the capacity of the molds, so as to complete deliveries at an earlier date.

XI. Thereafter the United States Government, by its authorities, continually refused to make any payments until the claimant should execute a contract in due form which would be sufficient to support payments, and transmitted to the claimant company a form of contract, purporting to have been signed and executed on the 28th day of March, 1918, but which was not, in fact, executed on that date and which the claimant, long after the delivery of all the copper covered by the original order, executed and signed under protest and with express reservations. A copy of said contract or instrument in the form of a contract, and purporting to be dated March 28, 1918, was signed by the company on or about the 13th day of January, 1919, and a copy thereof is hereto annexed, marked Exhibit "V." Said contract or instrument in the form of a contract was identical in terms with that first transmitted by the Ordnance Department of the Army to the claimant company under date of April 18, 1918,

41 with a difference only in the name of the contracting officer. A copy of the protest and reservations, dated January 13, 13, 1919, is hereto annexed, marked Exhibit "W." The receipt of this contract was acknowledged by letter of the Ordnance Department, dated January 14, 1919, a copy of which is hereto annexed, marked Exhibit "X." The claimant company, by letter of January 17, 1919 (a copy of which is hereto annexed, marked Exhibit "Y"), wrote the Ordnance Department of the Army, requesting that due note be taken of the fact that, contemporaneously with the delivery on behalf of the company of the executed contract, there was delivered to the contracting officer of the Department the company's letter, dated January 13, 1919, stating its protests and reservations. This letter was answered by the Ordnance Department of the Army, under date of January 22, 1919, a copy of which is hereto annexed, marked Exhibit "Z," acknowledging the receipt and filing of the claimant company's protest.

XII. Thereafter the claimant company was paid at the rate of 23½ cents a pound for all the balance of the copper for which it had not been previously paid.

XIII. By the National Defense Act of June 3, 1916 (Chapter 134, Sec. 120, 39 Stat. 213), compliance with all orders for products or material is made obligatory. The refusal to comply therewith is made a criminal offense, punishable by fine and imprisonment and the seizure of the plant of the manufacturer of such products or material, and it is provided by said section that the compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material



shall be fair and just. The price of twenty-six (26) cents a pound was, from and after the 2d day of July, 1918, the fair and just compensation for copper and was so fixed by competent authority as aforesaid.

XIV. Under the provisions of law and executive order and particularly of the act of March 2, 1919 (Chapter 94, Section 1, 40 Stat. 1272), there was constituted within the War Department a Board of Contract Adjustment, for the consideration and settlement of all war contracts, orders, or agreements, whether formal or informal, and to said Board claimant submitted its claim. Said claim was, by said Board, disallowed, whereupon the claimant appealed to the Secretary of War from said disallowance. The decision of said Board was, by said Secretary, affirmed.

XV. By Section 2 of the same act, jurisdiction is given to this court to find and award fair and just compensation due on any such war contracts, orders or agreements, whether formal or informal, and by Section 145 of the Judicial Code of March 3, 1911 (Chapter 231, 36 Stat. 1136), this court also has jurisdiction of all claims founded upon any contract, expressed or implied, with the Government of the United States, as well as of all claims founded upon the Constitution of the United States, and claimant relies upon the Fifth Amendment to the Constitution of the United States, providing that private property shall not be taken for public use without just compensation.

XVI. The claimant corporation and its officers are citizens of the United States and have at all times borne true faith and allegiance to the Government of the United States. The claimant is the owner of this claim and no assignment or transfer thereof has been made otherwise than as herein stated.

XVII. The claimant prays judgment as follows:

20,500,620 pounds of copper at 26 cents a pound . . .	\$5,330,161.20
Less payments received at 23½ cents per pound . . .	4,817,645.70
Balance . . . . .	\$512,515.50

KING & KING,  
*Attorneys for Claimant.*

GEORGE A. KING,  
CHARLES EARL,  
*Of Counsel.*

STATE OF NEW YORK,  
*County of New York, ss:*

Joseph Clendenin, being duly sworn, deposes and says: I am Vice-President of American Smelting and Refining Company, claimant

herein; I have read the above petition and the facts therein stated are true, to the best of my knowledge and belief.

JOSEPH CLENDENIN.

Subscribed and sworn to before me this 5th day of November, 1920.

[SEAL.]

S. KALISCHE,  
Notary Public, Queens County.

Certificate filed in Queens County, No. 2887.  
N. Y. County No. 359.  
N. Y. Register No. 1364.

45

VIII. *Exhibits to Amended Petition.*

EXHIBIT A.

War Department,  
Office of the Chief of Ordnance,  
Procurement Division,  
Sixth and B Streets, N. W.,  
Washington.

P. R. 2158—Item #1.  
P. R.

March 14, 1918. M. D. W./bef.

United Metals Selling Co.,  
42 Broadway,  
New York City.

GENTLEMEN:

Subject: 30,000 Metric Tons (66,138,000 Pounds) Copper for the French Government.

1. I am directed by the Acting Chief of Ordnance to advise you that the Procurement Division is prepared to procure from you 30,000 Metric Tons (66,138,000 pounds) of Copper—Prime Lake or Electrolytic—at a price of 23½c. net per pound, F. O. B. New York basis.

2. Deliveries to extend over a period of six months and are to be made at the rate of 5,000 Metric Tons per month starting with March. Attention is directed to Shipping Instructions #4670 issued under date of February 23d to be applied on this order, which covers the March delivery.

3. It is requested that your Company keep in touch with the French High Commission as to shapes, sizes and specifications which they will require on each month's shipments.

4. It is also directed that you keep in touch with the Supply Division, Ordnance Department, with reference to complete instructions as to the points of shipment to the various ports on the Atlantic Sea Board.

5. The above mentioned copper is to be Prime Lake or Electrolytic, 99.9% pure and not less than 99.88% pure according to the standard of the American Society for testing metals.

6. Usual Government terms of payment will prevail, and all that will be necessary for you to do is to forward assay certificate, weight certificate, with attached affidavit certifying to the correctness of these two, together with duplicate bill of lading to the Ordnance Department.

7. Your acceptance of this letter is requested pending issuance of formal contract which will be made out in a few days.

Respectfully,

RAW MATERIALS SECTION,  
R. P. LAMONT,

*Lt. Col. Ord. N. A.,*

By T. S. CHALMERS,  
*Capt. Ord. R. C.*

EXHIBIT B.

United Metals Selling Company,

42 Broadway.

New York, March 19, 1918.

War Department,  
Procurement Division,  
Sixth and B Streets, N. W.,  
Washington, D. C.

GENTLEMEN:

Subject: 30,000 Metric Tons (66,138,000 Pounds) Copper for the French Government.

Reference: P. R. #2158—Item 1.

Sym. P. R.

File P. 470. 15/6599.

This will acknowledge receipt of your letter of the 14th instant, in which you state that you are directed by the Acting Chief of

Ordinance to advise us that the Procurement Division is prepared to secure from us 30,000 metric tons of copper at 23½ cents per lb. f. o. b. New York basis, for deliveries extending over a period of six months, beginning with March.

By the terms of the President's announcement, dated January 23, we are precluded from confirming this order for delivery beyond June 1.

We would therefore ask you to correct the order to read 15,000 tons. If, however, you wish us to fill the order for the entire 30,000 tons, may we suggest that you make out two separate orders, one for 15,000 tons at the fixed price of 23½ cents per lb., and another for 15,000 tons at a price that may be determined later, applicable to the months of June, July and August.

Yours truly,

UNITED METALS SELLING CO.,  
By T. WOLFSON,  
*Vice-President.*

EXHIBIT C.

War Department,

Office of the Chief of Ordnance,

Procurement Division,

Sixth and B Streets N. W.,

Washington.

No. P4219—1788A.

Sym. PR P 470.15/7000.

March 23, 1918. MDW/bef.

United Metals Selling Co.,  
42 Broadway,  
New York City.

GENTLEMEN:

Subject: 30,000 Metric Tons Copper for the French Government.

1. I am directed by the Acting Chief of Ordnance to acknowledge your letter of March 19th with reference to your inability to deliver copper over a period of six months in accordance with instructions as outlined in above War Order due to expiration of agreement on June 1st.

2. The Department will issue today an amended contract requesting that you deliver the entire quantity of 30,000 Metric Tons as called for on War Ord. P-4219-1788A on or before June 1, 1918.

3. It is requested that you advise the Supply Division Ordnance Department, the quantities and specifications as to sizes and shapes

of the Copper which you have ready for shipment at the present time. On receipt of these advices by the Supply Division, you will be given Shipping Instructions for delivery to various ports on the Atlantic Sea Board.

48 4. Close Cooperation between your Company and the Supply Division, Ordnance Department (Major Jewett) will facilitate prompt movement of the Copper from the refineries.

5. It is requested that you acknowledge receipt of this letter.

Respectfully,

RAW MATERIALS SECTION.

R. P. LAMONT,

*Lt. Col. Ord. N. A.,*

By T. S. CHALMERS,

*Captain Ord. R. C.*

EXHIBIT D.

War Department.

Procurement Division,

Office of the Chief of Ordnance,

Sixth and B Streets N. W.,

Washington.

March 25, 1918. M. D. W./bef.

In replying refer to No. P. 4219-1788A.

Sym. P. R.  
File P. 470.15

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7048.

United Metals Selling Co.,  
42 Broadway, New York City.

GENTLEMEN :

Subject: 30,000 Metric Tons of Copper for the French Government.

1. I am directed by the Acting Chief of Ordnance to acknowledge your letter of March 5th on which, the Department have been advised by Mr. Mosehauer, you have failed to receive definite information.

2. The questions brought up in your letter were answered fully in the Procurement Order P. 4219-1788A, which possibly you have not received; and, in order to facilitate movements from your end, the Department will give you the information again as follows:

49 (a) All Copper shall be shipped in shapes specified by the French High Commission.

(b) All Copper for delivery at New York harbor should be taken up with the Ordnance Officer, Port of Embarkation, 90 West St., Hoboken, N. J. All Copper for delivery alongside steamers in Baltimore should be taken up with the Baltimore Depot, Q. M. U. S. Expeditionary, Canton, Baltimore, Md., Coca Cola Bldg., Attention of Captain Lewis.

(c) Payments will be made in accordance with previous arrangement with the Ordnance Department.

(d) Inspection on the part of the French Government will be made at the refineries by parties designated by the French High Commission.

3. Attention is directed that you must, under no consideration, take up with the Officer at Baltimore or Hoboken relative to the information as to where deliveries should be made for loading on ships unless you have the amounts available for immediate delivery. This point can not be impressed upon you too strongly, for after arranging steamer space, it upsets the whole shipping program to fall down on the amounts which arrangements are made for.

4. Attention is also directed that the entire quantity of 30,000 Metric Tons, as called for on War Ord. P. 4219-1788A, is to be delivered on or before June 1, 1918.

Respectfully,

RAW MATERIALS SECTION.  
R. P. LAMONT,  
*Lt. Col. Ord. N. A.,*  
By T. S. CHALMERS,  
*Capt. Ord. R. C.*

50

EXHIBIT E.

United Metals Selling Company,

42 Broadway.

New York, March 26, 1918.

War Department,  
Procurement Division,  
Office of the Chief of Ordnance,  
Washington, D. C.

(Attention Capt. Chalmers)

GENTLEMEN:

Subject: 30,000 Metric Tons of Copper for the French Government.

Reference: P.—4219-1788A, P. R. P. 470.15/7000.

We duly received your letter of March 23 in reference to 30,000 metric tons of copper for the French Government.

The matter was taken up to-day by the Copper Producers' Committee, and it was decided that this entire order be handled by the

American Smelting & Refining Company, instead of by the United Metals Selling Co.

As you are perhaps aware, the handling of copper has been divided by the Committee so that the United Metals Selling Company handles all the domestic business, and the American Smelting & Refining Company the export business. This order, therefore, would properly come under the jurisdiction of the American Smelting & Refining Co., who are much better organized for the handling of that business than is the United Metals Selling Company.

We would therefore request you to please change this procurement order to apply to the American Smelting & Refining Co., who, we assure you, will give the matter very prompt attention. The A. S. & R. Co. is now handling large export shipments against contracts made directly with the French Republic, and they tell us that it will quite fit in with their operations to handle this present order along with the other shipments.

Yours truly,

UNITED METALS SELLING CO.,  
By T. WOLFSON,  
*Vice-President.*

51

EXHIBIT F.

War Department,

Office of the Chief of Ordnance,

Procurement Division,

Sixth and B Streets N. W.,

Washington.

Ref. No. P. R. 2158.  
Sym. P. 4219-1788 A.  
File P. R.

March 28, 1918. M. D. W./bef.

American Smelting & Refining Co.,  
120 Broadway,  
New York City.

GENTLEMEN:

Subject: 30,000 Metric Tons Copper for French Government.

War Ord. P. 4219-1788 A.

1. I am directed by the Acting Chief of Ordnance to advise you that the Procurement Division is prepared to procure from you 30,000 Metric Tons (66,138,000 pounds) of Copper at a price of 23½c. per pound net, f. o. b. New York basis.

2. Deliveries are to be completed on or before June 1, 1918.

3. Shipping Instructions with reference to all shipments should be taken up with the Supply Division, Ordnance Department, Major Jewett.

4. It is requested that your Company keep in touch with the French High Commission, as to shapes, sizes and specifications, which they will require on this contract.

5. Inspection on the part of the French Government will be made at the refineries.

6. Payment papers are to be made out in accordance with attached instructions pertaining to shipment of raw materials and payment papers.

7. The above mentioned Copper is to be prime lake or electrolytic 99.9% pure not less than 99.88% pure according to standard of American Society for testing materials.

52 8. Your acceptance of this letter is requested pending issuance of formal contract which will go forward in a few days  
Respectfully,

RAW MATERIALS SECTION.  
R. P. LAMONT,

*Lt. Col. Ord. N. A.,*

By T. S. CHALMERS,  
*Capt. Ord. R. C.*

Attachment: (1) copy of instructions on shipments.

EXHIBIT G.

Copper Producers Committee,

827 Munsey Building.

Edward Mosehauer, Washington Representative.

Washington, D. C.,  
April 10, 1918.

American Smelting & Refining Company,  
120 Broadway,  
New York, N. Y.

GENTLEMEN:

We do not find in our files a reply from you to the Raw Materials Section, Procurement Division, to their letter of March 28th, No. P. 4219-1788 A. The acceptance asked for in paragraph 6 of that letter will constitute part of the record which will have to be completed before any payments can be made.

Kindly send us a copy of your reply. Will you also arrange in the future to include a carbon copy of all letters addressed to this office as we very often find it convenient to use such copies, and of course



extra copies of all letters addressed to the various departments in connection with the 30,000 ton order.

Yours truly,

COPPER PRODUCERS COMMITTEE.  
EDWARD MOSEHAUER.

53

EXHIBIT H.

American Smelting & Refining Co.,

120 Broadway.

New York, April 11, 1918.

Mr. Edward Mosehauer,  
Room 827, Munsey Building,  
Washington, D. C.

DEAR SIR:

Your letter of April 10th. Capt. Chalmers' letter of March 28th, referred to was received in my absence from the office. I hoped that the matter of acknowledgment was a formality and not necessary as Mr. Clendenin did not acknowledge it, simply leaving the letter for me. Because of the f. o. b. New York basis clause, and because of the fact that there were several open questions as to charges for extra shapes, etc., I hoped this would all be straightened out by you before we were obliged to formally accept the letter. You now advise, however, that such a formal acceptance is necessary, and Mr. Wolfson has told me he believes it proper for us to acknowledge the letter of March 28th as it stands.

I am therefore writing the letter and sending it to you herewith for you to transmit to Capt. Chalmers if everything seems to be in order.

Yours truly,

AMERICAN SMELTING & REFINING CO.  
H. M. BRUSH.

H. M. B. K. S.

## EXHIBIT I.

American Smelting & Refining Co.,  
120 Broadway.

New York, April 11, 1918.

Lieut. Col. R. P. Lamont,  
Procurement Division,  
Raw Materials Section,  
Washington, D. C.

Attention Capt. Chalmers.

DEAR SIR:

Subject: 30,000 Metric Tons Copper for French Government. War  
Ord. P. 4219, 1788 A.

54 We have your favor March 28th under the above reference  
number, and take pleasure in accepting your letter as above  
pending issuance of formal contract which we hope to receive in  
the near future.

Yours truly,

AMERICAN SMELTING & REFINING CO.  
H. M. BRUSH.

## EXHIBIT J.

American Smelting & Refining Co.,  
120 Broadway.

New York, June 27, 1918.

Colonel Samuel McRoberts,  
Ordnance Department, N. A.,  
Washington, D. C.

MY DEAR SIR:

Referring to proposed contract for 30,000 tons of copper, dated  
March 28, 1918, we beg to say:

1. The contract specifies deliveries are to begin on or before March  
1, 1918, and that they are to be completed on or before June 1,  
1918.

2. The Procurement order was originally tendered March 14 for  
deliveries over a period of 6 months (March—August) and refused  
because the United Metals Selling Company felt unauthorized to ac-  
cept orders for delivery beyond May 31 at the fixed price of 23½  
cents per pound.

3. The Procurement order was thereupon changed and tendered March 23 to United Metals Selling Co. for delivery on or before June 1, 1918, at the 23½ cent price, and then was followed up March 25 with instructions to them indicating that the copper was to be supplied in shapes as specified by the French High Mission. At the request of the United Metals Selling Co. the order was placed with this Company by letter dated March 28, 1918.

Shipping instructions have since been received, as follows:

55	March 25.....	2,500 tons	
	April 9.....	6,300 "	
	" 10.....	1,200 "	
	" 20.....	1,500 "	
	June 1.....	10,300 "	
			21,800 tons
	Shipping instructions have not been received for any part of the remaining.....		8,200 "
	Total .....		30,000 tons

5. We submit, therefore, that the contract as tendered has not been carried through by completion of delivery of the 30,000 tons on or before June 1, 1918; that this was due to no fault of ours, in that we have with the utmost diligence delivered the copper as and when called for by the Government, and that therefore we are in no respect responsible for the delayed delivery.

6. That notwithstanding contract calls for delivery of the 30,000 tons on or before June 1, 1918:

Shipping instructions were received prior to that date (March 25—April 20) for only.....	11,500 tons
Shipping instructions were received June 1 for.....	10,300 "
We have not yet received instructions for the remaining .....	8,200 "
	30,000 "

7. That the contract provision as to time of delivery could not be carried out:

(a) Because shipping instructions were not supplied by Government;

(b) If the shipping instructions had been supplied the copper was not in hand, having been demanded by other departments of Government for delivery to mills in this country.

(c) If the shipping instructions had been supplied there were no ships tendered to take it.

56 (d) The copper has been delivered practically immediately against shipping instructions as and when received, and to date the total quantity delivered is 18,299 tons.

8. That it is our understanding the price of 23½ cents applied only to deliveries effected to and including May 31, 1918, as per the President's Proclamation.

9. We think, therefore, we are entitled (1) to full settlement on all copper delivered prior to June 1st at the price of 23½ cents; (2) that on all copper delivered since June 1st we are entitled to the 23½ cents plus any increase that may be agreed upon between the Price-Fixing Committee and the Producers effective June 1st to this date; and (3) that all copper delivered hereafter be at the price agreed upon between the Price-Fixing Committee and the Producers as of date of shipment. We respectfully ask that contracts be re-drafted accordingly.

Yours very truly,

JOSEPH CLENDENIN.

EXHIBIT K.

War Department,

Office of the Chief of Ordnance,

Procurement Division,

Sixth and B Streets N. W.,

Washington.

PR P4219—1788A.

HC/mh.

July 1, 1918.

P 470 15/10106.

American Smelting & Refining Co.,  
120 Broadway, New York:

Attention of Capt. H. Corliss.

Attention Mr. Joseph Clendenin, Vice-President.

Subject: 30,000 Metric Tons Copper.

SIRS:

1. I am directed by the Acting Chief of Ordnance to acknowledge receipt of your letter of June 27th, 1918, with regard to a contract for 30,000 Metric Tons of Copper, dated March 28th, 1918.

57      2. The contents of your letter has been carefully noted, and you are advised that this Department feels that in view of you having accepted this office's letter of March 28th, P 470,

15/7201 by yours of April 11th, P 470. 15/8378, that the Department is entitled to the delivery of the entire 30,000 Metric Tons at the price mentioned therein—namely, 23½ cents per pound, f. o. b. New York basis.

3. Insofar as the delay in deliveries is concerned, it is called to your attention that on May 2d you requested of Major Chalmers to be allowed to continue deliveries beyond June 1, 1918.

4. The Department therefore requests that the contract in question be executed and returned.

Respectfully,

SAMUEL McROBERTS,  
*Colonel Ord. N. A.,*  
By R. P. LAMONT,  
*Lt. Col. Ord. N. A.*

EXHIBIT L.

TSS/emp.

PL P4219—1788A.

August 15, 1918.

Capt. Schultz.

Mr. Pope Yeatman,  
War Industries Board,  
Council of National Defense,  
18th & D Sts. N. W.,  
Washington, D. C.

Through Major J. H. K. Davis, Liaison Officer.

Subject: Contract Between American Smelting & Refining Company and the United States, War Ord. P4219—1788A, for 30,000 Metric Tons of Copper, at \$0.235 per Pound.

SIR:

1. I am directed by the Chief of Ordnance to refer to a contract between the American Smelting & Refining Company and the United States, War-Ord-P4219-1788A, for 30,000 metric tons of Copper at \$0.235 per pound, dated March 28, 1918.

2. Deliveries under the terms of this contract were to commence on or before March 1, 1918, and to be completed on or before June 1, 1918. As of July 1, 1918, the Contractor had failed to deliver 24,340,900 pounds of copper.

3. The Contractor contends that it understood the price of \$0.235 applied only to deliveries effected to and including May 31, 1918, and asks to be permitted to charge \$0.26 for all copper delivered subsequent to July 2, 1918. It will be observed that the Contractor, without objection, made continuous deliveries from May 31 to a time subsequent to July 2, 1918.

4. The terms of the contract outlined above express the bargain between the Contractor and the United States. Neither the Contractor nor the United States may vary the terms of a contract.

5. The procurement Division has no authority to sacrifice the rights of the United States. It is, therefore, respectfully submitted that the American Smelting & Refining Company must deliver to the United States 30,000 metric tons of Copper at \$0.235 per pound.

Respectfully,

CHARLES N. BLACK,  
*Lieut. Col. Ordnance U. S. A.,*  
By RALPH CREWS,  
*Lieut. Col. Ordnance U. S. A.*

EXHIBIT M.

War Industries Board,

Washington.

B. M. Baruch, Chairman.

August 16, 1918.

Mr. Jos. Clendenin,  
c/o American Smelting & Refining Co.,  
120 Broadway, New York.

DEAR MR. CLENDENIN:

Enclosed herewith find a copy of a letter signed by the Ordnance Department re the question of contract for 30,000 metric tons of copper on War Order P-4219-1788A. From this it would appear that I have no rights as an arbitrator in the matter of this contract by reason of the Ordnance Department not having authority to alter the terms of the contract.

I am therefore returning the papers you sent me and much regret that the matter could not have been settled along the lines we started out on.

I remain,

Yours very truly,

POPE YEATMAN,  
*Non-Ferrous Metals Section.*

## EXHIBIT N.

American Smelting and Refining Co.,

120 Broadway,

Copper Sales Department,

Joseph Clendenin, Manager; Hamilton M. Brush, Assistant Manager.

New York, August 16, 1918.

Capt. T. S. Chalmers,  
War Department,  
Procurement Division,  
6th and "B" Sts. N. W.,  
Washington, D. C.

DEAR SIR:

Procurement Order P4219-1788A.

We are sending today to the disbursing officer in New York various invoices covering shipments of copper made since July 2d against the above Procurement Order for two reasons:

1. Because we have been urged by your New York Officer that he should have these papers promptly; and
2. Because our subcontractors are pressing us for the money, of which they are in urgent need.

We have held up invoices in the expectation that all or a considerable part of them would be invoiced at 26c. per pound, following appeal to Mr. Pope Yeatman of the War Industries Board, and because of our belief that we were entitled to the 26c. per pound price.

60 We are submitting the invoices made out at 23½c. per pound as we understand that this is the only price at which they will be paid at this time, but we beg to advise that we still maintain that we are entitled to receive the Government's July price; i. e., 26c. per pound on a part of this contract, and we respectfully protest against the presentation of these invoices, under the circumstances and the receipt of payment in accordance therewith, being taken as a waiver of our right to receive this higher price and to take every proper measure to secure its payment.

Yours truly,

AMERICAN SMELTING AND REFINING  
COMPANY.

H. M. BRUSH.

H. M. B.: K. S.  
L. H.  
Lt. F.

## EXHIBIT O.

American Smelting &amp; Refining Co.,

120 Broadway.

New York, September 11, 1918.

Mr. Pope Yeatman,  
War Industries Board,  
18th and D Sts.,  
Washington, D. C.

DEAR MR. YEATMAN:

Referring to your favor of the 16th ult., with letter attached from the Ordnance Department:

1. In our opinion their statement does not accord with the facts. It assumes the existence of a "contract," definite in terms and voluntarily entered into.

2. We have accepted a so-called Procurement order in the form of a letter as per copy attached advising us that the Department is "prepared to procure from us 30,000 tons of copper, pending issuance of formal contract, etc." This letter, in view of its phrasing, and considering the powers vested in the Secretary of War by recent Congressional legislation, amounted in substance to a requisition and a command.

3. No formal contract has been executed—neither party having signed.

61 4. Final payment has been withheld in the case of each shipment, pending signing of the contract.

5. Our reasons for not signing the contract are well known to you and to the Ordnance Department.

6. We have protested the whole procedure from its inception and many times during the past four to five months.

7. We have delivered the copper as fast as possible, and to the best of our knowledge as fast as required, relying on the Government eventually to heed our protests and give us a square deal.

8. By arrangement in the Price-Fixing Committee conference of July 2d you were authorized to arbitrate and decide the various issues between the producers and representatives of the War and Navy Departments.

9. The proposition has been discussed several times in informal conferences with both sides represented. It has also been formally put up to you as umpire by both sides, as per agreement with the Price-Fixing Committee.

10. We question the right of the Ordnance Department to withdraw from the agreement of July 2d, if its letter of August 15th



was so intended, which we find it difficult to believe, and respectfully ask that you proceed with the arbitration to a decision.

Yours very truly,

JOSEPH CLENDENIN.

EXHIBIT P.

Ordinance Department,

Office of Ordinance District Chief,

1107 Broadway,

New York, N. Y.

T. D./M.

Finance Division.

October 7, 1918.

American Smelting & Refining Co.,  
120 Broadway,  
New York, N. Y.

GENTLEMEN:

We are just advised by the Legal Section, Procurement  
62 Division, that contract P-4219-1788-A was sent to you for  
signature on June 10, 1918, and has not yet been returned.  
In this connection, you are advised that this office has no recourse  
but to withhold further payments under this contract until infor-  
mation has been received to the effect that it has been properly exe-  
cuted. In order that it will not be necessary to adopt this course, it  
is suggested that you arrange with the Procurement Division for the  
issuance of a procurement order which will be sufficient to support  
payments until such time as the formal contract is fully executed.

THOMAS DENNY,  
Major Ord. Dept., U. S. A.,  
Financial Manager.

## EXHIBIT Q.

American Smelting &amp; Refining Co.,

120 Broadway.

New York, October 8, 1918.

Ordinance Department,

Finance Division,

1107 Broadway,

New York, N. Y.

DEAR SIRs:

Attention Major Thomas Denny.

Referring to our telephone conversation of this morning, we take pleasure in handing you herewith copy of letter received by this Company under date of March 28th from the Procurement Division.

Would you mind letting us have copy of the letter you received yesterday from the Procurement Division, which was referred to by you in our telephone talk, and which resulted in your writing your letter of October 7th which we have before us.

Yours truly,

AMERICAN SMELTING & REFINING CO.  
H. M. BRUSH.

63

EXHIBIT R.

P. J. G./as.

Amer. Smelting &amp; Refining Co.

F. 160. 12,243.

5th Ind.

Ordinance Dept.,

Adm. Div.,

Finance Section.

Oct. 4, 1918.

To New York District Ordinance Office,

Finance Division,

New York City:

The Legal section, Procurement Division, advises this office that there is no record of a Procurement Order under P-4219-1788-A

and that Contract under this war Order number, which was sent to the contractor June 10th for signature, has not been returned.

H. A. GIDNEY,  
*Major Ord. Dept. U. S. A.,*  
By P. J. GUINThER,  
*Lieut. Ord. Dept., U. S. A.*

EXHIBIT S.

Ordinance Department,

Office of Ordinance District Chief,

1107 Broadway,

New York, N. Y.,

Finance Division.

P. A. G./M.

October 14, 1918.

American Smelting & Refining Co.,  
120 Broadway,  
New York, N. Y.

GENTLEMEN :

Copy of letter from the Procurement Division forwarded with your letter of the eighth instant in connection with unexpected contract P-4219-1788-A is returned herewith.

This communication is not a procurement order and is not sufficient to support payments to the American Smelting & Refining Company. For your information, we transmit copy of communication from the Washington Office stating that no procurement order has been issued and that the formal contract sent to you for signature on June 10, 1918, has not been signed.

In order that it will not be necessary to withhold payment, 64 it is suggested that you either arrange for the issuance of a procurement order or execute the contract sent to you several months ago.

THOMAS DENNY,  
*Major Ord. Dept. U. S. A.,*  
*Financial Manager,*

By P. A. GALLEHER,  
*Captain Ord. Dept. U. S. A.,*  
*Disbursing Officer.*

## EXHIBIT T.

American Smelting &amp; Refining Co.,

120 Broadway.

New York, October 16, 1918.

Procurement Division,  
Office of the Chief of Ordnance,  
War Department,  
Washington, D. C.

GENTLEMEN:

(1) Your attention is respectfully invited to the letter of the Finance Division, Office of Ordnance District Chief, 1107 Broadway, New York, to this Company, dated October 7, 1918, copy of which is enclosed.

The payments thus withheld by the Finance Division amount in the aggregate, at the present time, to approximately \$732,000.

(2) Referring to contract P.-4219-1788-A, mentioned by the Finance Division, at no time since June 11, 1918, when it was tendered to us for execution, could this Company have executed and delivered the same without assuming an obligation to perform the impossible and without putting itself in the position of having committed a breach of contract from the moment of its delivery.

(3) At no time since the contract was tendered could this Company have executed the same without binding itself to accept a price for a large part of the tonnage involved, inadequate in itself, and less than the price which it was generally thought would shortly be fixed by Governmental authority, or less than the price actually fixed by the Price-Fixing Committee of the War Industries Board on full information and after extended hearings on July 2, 1918.

(4) This Company can not now execute and deliver the contract in question without forthwith putting itself in default thereunder and without waiving its claim to be paid the price so fixed on the tonnage in question and abandoning all its rights in the premises.

(5) No suggestion has ever been made that the Company is not entitled to receive at least 23½ cents per pound on such tonnage. It is understood that the Procurement Division of the Office of the Chief of Ordnance, not only concedes, but maintains, that 23½ cents per pound is payable. In respect of all deliveries hitherto made in this connection, pursuant to the order or orders of the Procurement Division, payments have actually been made on the basis of 23½ cents per pound (with a deduction of 5% pending the receipt of signed contracts), notwithstanding the non-execution of the contract in question, and such payments have been accepted by this Company under protest as to deliveries made on and after July 2, 1918.

It is assumed as of course that the Procurement Division will wish, as a matter of fair dealing, to take such action as will assure the prompt payment of what is admittedly due in any aspect of the matter, and thus avoid the unnecessary hardship which would be suffered by this Company and by the copper producers for whom it acts, if the payments referred to by the Finance Division were indefinitely withheld. On the basis of 23½ cents, the deferred payments involve the tying up of large sums:

Amount of the 5% already withheld.....	\$750,000
Amount of the 95% now withheld on deliveries made....	732,000
Amount of the 95% threatened to be withheld on deliveries due within 30 days.....	900,000
Amount of the 5% on the two latter sums.....	80,000

(6) Should the existence of an executed contract constitute a technical necessity in order to satisfy the requirements of the statutes or the regulations governing the disbursement of public monies, this Company is willing to execute and deliver the contract in question, if it may append thereto, to be considered as part thereof, a stipulation or proviso to the effect that the provision as to deliveries is and has been subject to modification and that the contract price for all copper delivered on and after July 2, 1918, is in controversy and subject to future agreement or determination by competent authority.

(7) Noting the suggestion of Major Denny, Financial Manager, Office of Ordnance District Chief, Finance Division, that we arrange with the Procurement Division "for the issuance of a procurement order which will be sufficient to support payments until such time as the formal contract is fully executed," we would respectfully request the issuance of such an order, on the understanding that we shall not be estopped or otherwise foreclosed thereby from asserting our claim to be paid the higher price mentioned, in effect since July first last, nor be otherwise deprived of any of our existing rights in the premises.

(8) We have agreed to submit our claim in respect to the higher price to the determination of Mr. Pope Yeatman, of the Non-Ferrous Metals Section of the War Industries Board, to whom we understand the matter has been referred with the consent of the War Department by the Price-Fixing Committee.

What we venture to request in the meantime is that the payments now admittedly due be made at once, without prejudice to the rights or interests either of the United States or of ourselves.

Very respectfully,

JOSEPH CLENDENIN.

## EXHIBIT U.

October 30, 1918.

American Smelting & Refining Co.,  
120 Broadway,  
New York.

(Attention Mr. Clendenin.)

GENTLEMEN:

(1) I am directed by the Chief of Ordnance to acknowl-  
67 edge the receipt of your letter of October 16, 1918.

(2) In reference contract War Ord. P4219-1788A we are advised that the bargain contemplated the delivery by you of 66,138,000 pounds of copper at  $23\frac{1}{2}c.$  per pound.

(3) To obtain payment from the United States it will be necessary to furnish an executed contract between yourselves and the United States to the Disbursing Authority.

(4) By timely application extension of delivery requirements could have been obtained by proof of delay due to causes beyond your control and without your fault.

(5) Attention is directed to the fact that your contract contains no liquidated damage clause.

Respectfully,

CONTRACT SECTION.  
T. S. SCHULTZ.

## EXHIBIT V.

American Smelting and Refining Company  
and  
United States of America.

Ordnance Department,  
U. S. Army.

Fixed Price Contract.

30,000 Metric Tons, or 66,138,000 Pounds of Copper.

Dated March 28, 1918.

Expires June 1, 1918.

(Ordnance Seal.)

These Articles of Agreement, entered into this 28th day of March, 1918, by and between American Smelting and Refining Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and having its general office  
68 at 120 Broadway, New York, N. Y. (hereinafter called the Contractor), of the first part, and the United States of Amer-

ica, by R. H. Hawkins, Major, Ord. Dept., U. S. A. (hereinafter called the Contracting Officer), acting by and under authority of the Chief of Ordnance, United States Army, and under the direction of the Secretary of War, of the second part:

Witnesseth,

Whereas a state of war exists between the United States of America and the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, constituting a national emergency.

Now, therefore, under the provisions of section 120 of an act of Congress relating to national defense, approved June 3, 1916, and pursuant to all other laws of the United States and Executive Orders of the President of the United States or heads of its departments under which the requirements of advertisement for proposals are dispensed with and contracts in the form hereof duly authorized, and in consideration of the mutual agreements herein contained, the said parties have agreed and by these presents do agree to and with each other as follows, viz:

Article I. The Contractor agrees to make and deliver to the United States 30,000 metric tons, or 66,138,000 pounds, of electrolytically refined copper, or, at its option, Prime Lake copper, 99.9 per cent pure, and in any event either Prime Lake copper or electrolytic copper is to be not less than 99.88 per cent pure, in accordance with the standards of the American Society for Testing Metals. The United States agrees to pay for the copper herein contracted for, all upon the terms and conditions in this contract set forth.

Article II. The Contractor agrees to deliver to the United States the copper herein contracted for on cars or on lighters at or near plants represented by the Contractor, deliveries to begin on or before March 1, 1918, in accordance with shipping instructions of the Chief of Ordnance, at the rate of 10,000 metric tons per month, and to be completed on or before June 1, 1918. Such deliveries will be f. o. b. cars and on lighters at or near plants, providing such plants are on the Atlantic or Pacific seaboards. Should the copper be shipped from refineries in the interior of the United States, such as from Great Falls, Mont., or the Lake plants in Michigan the Contractor will pay the carload lot freight rate prevailing at the time of shipment from such plant to New York, N. Y. Should the Contractor be required to make delivery by lighter, the United States will pay for such lighterage service at the prevailing market rates. The Contractor agrees to make shipments from such plants as will be most advantageous to the United States' interests, both in the matter of freight and time required for delivery.

The Contractor shall deliver the copper her-in contracted for to the United States in regular commercial shapes, such as ingots, cakes, wire bars, and ingot bars, in accordance with the schedules of the several refineries. Should billets or extra heavy cakes be called for or be required by the United States, the Contractor will be paid the extra charge applying thereto in the particular plant furnishing copper in such shape.

Time being of the essence, the Contractor undertakes to increase the production to such a maximum rate as facilities and equipment permit.

The performance of this contract shall have precedence over all work for parties other than the United States. The Contractor shall from time to time, and whenever requested so to do by the Chief of Ordnance, furnish to the Chief of Ordnance statements and reports on the progress of the work and any factors bearing on deliveries.

The Contractor will not be held responsible for delays in delivery due to the delay of the United States or the French Government in inspecting, or for other unreasonable delays due to causes beyond the control and without the fault of the Contractor, but simultaneously with the removal of such causes for delay the Contractor shall proceed with the performance of this contract, due allowance for such delay having been made. The Contractor agrees, in  
70 view of the emergency necessitating this contract, to use its best endeavors to remove such cause for delay.

In the event of the United States failing to give the Contractor shipping instructions calling for shipment of any part of the copper within the time specified in the Contract, or in the event of the United States specifically instructing the Contractor to store any of the copper, the Contractor agrees to store, at the risk and expense of the Contractor, for a period of thirty (30) days any quantity of copper hereby contracted for without charge. After the expiration of said thirty (30) days, the copper so stored (unless previously delivered hereunder) shall be held by the Contractor at the expense and risk of the United States, it being agreed that the expense of such storage, to be paid by the United States to the Contractor, shall be twenty-five cents (25c.) per ton of 2,000 lbs. per month, which *chareg* shall include the cost of handling in and out of storage.

The United States agrees to make payment to the Contractor upon presentation of proper storage certificates with the invoice, together with weight and assay certificates, in the same manner as though the copper had been shipped. The Contractor further agrees to make shipment of the copper at any subsequent time upon orders of the United States.

The Contractor at its own expense shall suitably mark the copper and load the same on cars or on lighters and at the cost of the United States after delivery shall ship the copper to any point in the United States, making all arrangements for transportation, all according to the instructions of the Chief of Ordnance.

Article III. The sum of \$0.235 f.o.b. cars New York basis hereby fixed as the contract price of each pound in weight of the copper delivered and accepted, will be paid by the United States to the Contractor as follows:

(1) Upon the certificate of the inspecting and receiving officer showing delivery and acceptance the United States will pay the sum of \$0.235 for each pound in weight of the copper delivered and ac-



cepted as soon as practicable after such certification.

71 To facilitate prompt payments the United States may attach a disbursing officer to the main office or plant of the Contractor. No payments by the United States shall act to prevent the United States from later disputing the validity thereof under this contract.

Article IV. All materials furnished under this contract, the plant, machinery, tools, and equipment, all workmanship, and the copper shall be at all times subject to inspection by the officers or agents of the Ordnance Department or persons designated by the Chief of Ordnance, and the Contractor shall furnish reasonable facilities and assistance for all such inspection, and whatever of the copper does not in all respects fulfill the requirements of the contract shall be rejected.

Should any disputes arise as to the copper delivered being in accordance with specifications, a sample of the copper shall be submitted for analysis to Ledoux & Co., 99 John Street, New York, or to Lucius Pitkin, Inc., 47 Fulton Street, New York, for determination of the analysis. If they are unable to act, an umpire mutually agreeable to the United States and the Contractor shall act, or the Contractor and the United States shall request the president of the Chamber of Commerce of New York City to name the chemist or metallurgist of recognized standing to act as such umpire. The fees and expenses involved in such analysis shall be paid by the party in error. Should there be a default in the quality of the copper received, the Contractor shall bear the expense of shipment to and from the point of delivery.

At the option of the Chief of Ordnance, inspection of the copper at the mill of the Contractor may be waived.

The Contractor agrees to immediately replace, without cost to the United States, all copper so rejected. The Chief of Ordnance may withhold out of payments to be made hereunder on any account an amount sufficient to cover the cost thereof until proper replacement of rejected copper.

Article V. In the event of the Contractor's inexcusable default in making the deliveries herein scheduled, the Chief of

72 Ordnance may cancel this Contract without prejudice to any claim of the United States hereunder, and complete the manufacture or purchase elsewhere, of all or any of the copper herein contracted for then remaining undelivered and charge the Contractor with all loss, damage, and expense in excess of the contract price of the copper incurred as a result of such action.

Article VI. This Contract being necessitated by a state of war now existing between the United States of America and the Imperial German and the Imperial and Royal Austro-Hungarian Governments, it is desirable and expedient that provision be made for its cancellation upon fair and equitable terms in the event of the termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the Chief of Ordnance

should be of the opinion that the completion of this Contract has become unnecessary.

It is therefore provided that at any time, and from time to time, during the currency of this Contract, the Chief of Ordnance may notify the Contractor that any part or parts of the copper herein contracted for then remaining to be delivered shall not be manufactured or delivered.

In the event of the cancellation of this Contract, as in this Article provided, the United States will inspect the completed copper then on hand and such as may be completed within thirty (30) days after such notice, and will pay to the Contractor the price herein fixed for the copper accepted by and delivered to the United States. The United States will also pay to the Contractor all obligations incurred solely for the performance of this Contract of which the Contractor can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the Contractor for work, labor, and service rendered under this Contract.

The United States may refuse to make any payment or to reimburse the Contractor for or on account of the copper to be delivered under this Contract, whether in the process of manufacture or manufactured as provided in this Article, in respect to the delivery of which copper the Contractor shall be in inexcusable arrears at the time of such termination or cancellation.

73 The decision of the Chief of Ordnance as to payments and allowances to the Contractor under this Article, made in accordance with the terms of this Contract and with the definition of "Cost Pertaining to Contracts" issued by the Finance Division, Ordnance Department, United States Army, dated June 27, 1917, made a part hereof, will be final and binding on both parties hereto.

The foregoing provision with regard to payments to be made by the United States upon the cancellation of this Contract shall also apply in the event that performance by the Contractor of this Contract is finally prevented by causes determined by the Chief of Ordnance to have been beyond the control or without the fault of the Contractor.

Article VII. The Contractor hereby, for the consideration herein named, waives and releases all lien or right of lien now existing or that may hereafter arise for work or labor performed or materials furnished or for any other reason or cause under this contract, under any lien law, State or Federal, upon any material, supplies, and the like coming into its possession which it is herein contemplated shall presently or ultimately become the property of the United States; and the Contractor agrees not to create or suffer to be created any mortgage, lien, pledge, attachment, or other incumbrances upon any such material, supplies, or other property in its possession, and in the event that such mortgage, pledge, lien, attachment, or incumbrance is created the Contractor agrees to pay and discharge, or if it disputes the validity of the claim out of which such incumbrance arises, immediately to bond the same to the end that all property shall at all times be and remain free from all incumbrance.

Article VIII. This contract shall not, nor shall any right to receive payment or any other interest therein, be transferred or assigned by the Contractor to any person, firm, or corporation without the consent of the Secretary of War.

74 The Contractor shall make all subcontracts, purchases, payments, and arrangements for performing this contract in its own name and for its own account, and shall not bind or purport to bind the United States except as the Chief of Ordnance shall otherwise direct in writing. All subcontracts must be approved by the Chief of Ordnance or his duly accredited representative.

The Contractor shall, unless otherwise directed by the Chief of Ordnance, insert in every contract hereafter made for increased facilities, labor, material, supplies, and the like, or otherwise relating to the performance of this contract, a provision that such contract may be assigned by the Contractor and that it relates to a "main contract" between the Contractor and the United States.

Article IX. No Member of or Delegate to Congress or Resident Commissioner, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this article shall not apply to this contract so far as it may be within the operation or exception of section 116 of the act of Congress approved March 4, 1909 (35 Stats. 1109).

Article X. No person or persons shall be employed in the performance of this contract who are undergoing sentences of imprisonment at hard labor which have been imposed by the courts of the several States, Territories, or municipalities having criminal jurisdiction.

Article XI. Except as this Contract shall otherwise provide, any doubts or disputes which may arise as to the meaning of anything in this Contract shall be referred to the Chief of Ordnance for determination. If, however, the Contractors shall feel aggrieved at any decision of the Chief of Ordnance upon such reference it shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding on both parties hereto.

Article XII. Wherever the term "Chief of Ordnance" is used in this Contract the same shall be construed to include the Acting Chief of Ordnance or any person designated to act as the Chief of the Ordnance Department, United States Army, or any person who is accredited as his duly authorized representative.

75 Article XIII. Notice under this contract when not actually given to the Contractor shall be deemed to have been sufficiently given to and received by the Contractor when mailed in a sealed postpaid wrapper addressed to the American Smelting and Refining Company, 120 Broadway, New York, N. Y.

Article XIV. This Contract may be completed and so certified by the Chief of Ordnance by the delivery to and acceptance by the

United States of the articles herein ordered, plus or minus five (5) per cent thereof.

Article XV. The Contractor agrees to hold and save the United States, and all persons acting under them, harmless from and against all liability on account of any patent rights granted by the United States which may affect the articles herein contracted for, or their manufacture, or the performance of his contract in any manner whatsoever.

Article XVI. The Contractor agrees to refrain from exploiting by publicity or otherwise its product manufactured in pursuance of this contract, and of any and all contracts and orders heretofore or hereafter entered into or placed with the Contractor, and its products manufactured under any arrangement with the United States whatsoever, and the Contractor agrees to refrain from in any way publicly advertising the fact of the manufacture of said product, and to refrain from publishing or causing or allowing to be published any photographs, drawings, written or printed matter, or other data disclosing the copper or parts of the same, or the process of manufacture, or the plans of the Government, or any information concerning the same or which shall result in such disclosure. The Contractor agrees to submit to the Chief of Ordnance all pictures or printed matter showing, describing, or in any way relating to the progress of the work to be prosecuted under this Contract and under any and all contracts and orders heretofore or hereafter entered into or placed with the Contractor, or under any arrangement with the United States whatsoever, which he may desire to publish, before publishing the same, and the Chief of Ordnance may prohibit such publication. The Contractor further agrees to refrain  
75 from giving any information whatsoever relative to any experiments that may be carried out by it at the instance of the United States.

Article XVII. In addition to the ordinary precautions heretofore adopted by the Contractor for the guarding and protection of its plants and work, the Contractor shall provide such additional watchmen and devices for protection of its plants and property and the work in process for the United States against espionage, acts of war and of enemy aliens as may be required by the Chief of Ordnance. The Contractor shall, when required, report to the Chief of Ordnance the citizenship, country by birth, or alien status of any and all of its employees. When required by the Chief of Ordnance, the Contractor shall refuse to employ, or, if already employed, forthwith discharge from employment and exclude from its works any person or persons designated by the Chief of Ordnance for cause as undesirable for employment in a plant engaged on work for the United States. The United States shall pay to the Contractor as part of the cost of the copper any expense incurred by the Contractor which shall be determined by the Chief of Ordnance to be directly caused by the requirements of this Article.

In witness whereof the parties hereto have caused this contract

to be executed under their seals (in sextuplicate) by their respective officers, duly authorized, the day and year first above written.

AMERICAN SMELTING AND REFINING  
COMPANY,  
*Contractor.*

[SEAL.] JOSEPH CLENDENIN,  
*Vice-Prest.*

Witnesses:

Signatures:

\_\_\_\_\_  
\_\_\_\_\_

Attest:

W. E. MERRISS,  
*Secy.*

UNITED STATES OF AMERICA,  
By R. H. HAWKINS,  
*Major Ord. Dept. U. S. A.*

- 77 SCHEDULE 1 ATTACHED TO AND A PART OF A CERTAIN CONTRACT BETWEEN AMERICAN SMELTING AND REFINING COMPANY AND THE UNITED STATES OF AMERICA, DATED THE 28TH OF MARCH, 1918.

*Detail of Cost Accounting.*

The term "cost" as applied to this contract consists of four elements which are concretely defined in the following:

- (1) The cost of all direct labor paid for by the Contractor and used in the production of the copper contracted for herein.
- (2) The cost of all direct materials contained in or forming part of the copper contracted for herein.
- (3) Pro rata share of factory overhead expense applicable to and necessary in connection with the manufacture of the copper contracted for herein.
- (4) Pro rata share of administrative and general expense applicable to and necessary in connection with the manufacture of the copper contracted for herein.

The foregoing paragraphs Nos. 1, 2, 3, and 4 are subject to further amplification as contained in the "Definition of cost pertaining to contracts" to be supplied by the Finance Division (Accounting Section) of the Ordnance Department. As conditions arise necessitating changes or modifications in the definitions referred to the Chief of Ordnance will furnish the Contractor with information in regard thereto.

## EXHIBIT W.

American Smelting &amp; Refining Co.,

120 Broadway.

Joseph Clendenin, Vice-President.

New York, January 13, 1919.

Procurement Division,  
Raw Materials Section,  
Office of Chief of Ordnance,  
Washington, D. C.

GENTLEMEN:

Attention of Captain T. S. Schultz.

Referring to War Order P4219-1788A, for 30,000 metric tons of copper for the French Government, and to the formal contract in relation thereto, forwarded to us in June last, please find herewith the formal contract in question duly executed by this Company in triplicate. The delivery of this executed contract is made under the circumstances and subject to the reservation following:

The formal contract enclosed specifies the price of  $23\frac{1}{2}$  cents for the entire tonnage of 66,136,608 pounds. The Company claims the right to receive payment of the balance due on this tonnage, as follows: in respect of 45,635,988 pounds approximately, delivered prior to July 2, 1918, when the price of copper in effect fixed by the Price-Fixing Committee of the War Industries Board was  $23\frac{1}{2}$  cents, at the rate of  $23\frac{1}{2}$  cents per pound; in respect of 20,500,620 pounds approximately, delivered after July 2, 1918, when the official price in effect was 26 cents per pound, at the rate of 26 cents per pound. For a fuller statement of such claim, and of the grounds on which it is based, reference is made to the letter of appeal addressed by the Company to the Secretary of War, dated November 21, 1918. The Procurement Division has hitherto denied or disputed the right of the Company to be paid at the rate of 26 cents per pound for any portion of the copper delivered. The Company has hitherto declined to execute the formal contract because it failed to stipulate the price of 26 cents per pound for copper delivered after July 2, 1918. Since October 7, 1918, payments on any price basis have been stopped, pending the execution of a formal contract. The balance due and unpaid at  $23\frac{1}{2}$  cents is \$2,714,477.13, or thereabouts. Both contracting parties are agreed that the Company is entitled to be paid in respect of the balance due at the rate of  $23\frac{1}{2}$  cents per pound at least. As it is understood, however, the amount thus admittedly due in any aspect of the matter can not be paid under conditions governing the disbursement of public moneys, in the absence of a formal contract. The contracting officers of the Government

are unwilling to consent to the specification in the contract of any other price than  $23\frac{1}{2}$  cents for any part of the tonnage. The

79 Company is unwilling to execute the contract with a provision therein specifying the price of 26 cents for tonnage delivered after July 2, 1918, except with the explanation and reservations contained in this letter. Accordingly,—

The Company executes and delivers the formal contract in question under protest, and subject to the proviso that it shall not be estopped or precluded thereby from asserting its aforesaid claim to the same extent and with like effect as if such formal contract had not been executed and delivered, and that, such formal contract to the contrary notwithstanding, the price lawfully payable in respect to all copper delivered pursuant to the order in question after July 2, 1918, shall remain subject to future agreement between the parties, or to determination by competent authority. The intention of this proviso is that the rights and interests, neither of the United States on the one hand, nor of the Company on the other, in respect to the price matter referred to, as they now exist, shall be in any wise prejudiced or jeopardized by the delivery and acceptance of the formal contract in question with this letter attached, or by the payment and acceptance of the balance due on the price basis of  $23\frac{1}{2}$  cents.

It is understood that the provisions of said formal contract in respect to time of delivery shall be deemed to have been modified to correspond with the delivery dates which actually governed.

Very respectfully,

AMERICAN SMELTING & REFINING CO.,  
By JOSEPH CLENDENIN,  
*Vice-President.*

## EXHIBIT X.

R. H. H. / jsc.

War Department,

Office of the Chief of Ordnance,

Production Division,

Washington.

To insure prompt attention, in replying refer to  
P. L. No. P4219—1788A.

Attention of Major R. H. Hawkins.

80

January 14, 1919.

Major Hawkins,

American Smelting & Refining Co.,  
120 Broadway,  
New York, N. Y.

GENTLEMEN:

1. I am directed by the Chief of Ordnance to refer to your contract for 30,000 metric tons or 66,138,000 pounds of copper.

2. The contract was originally forwarded to you in June, 1918. After a number of conferences the contract in the present form (61285) was executed by you and by the Contracting Officer. Your copy was furnished to your Mr. Charles Earl.

Respectfully,

CONTRACT SECTION,

By R. H. HAWKINS,

Major Ordnance Dept. U. S. A.,  
Officer in Charge.

EXHIBIT Y.

American Smelting and Refining Co.,

120 Broadway.

Joseph Clendenin, Vice President.

New York, January 17, 1919.

Production Division,

Contract Section,

Office of Chief of Ordnance,

Washington, D. C.

GENTLEMEN:

Attention of Major R. H. Hawkins.

Please accept our thanks for your letter of January 14, 1919, referring to our contract for 30,000 metric tons of copper, noting that



the contract in question, which had been forwarded to us in June, 1918, had after a number of conferences been executed by us and by the contracting officer in the present form (61,285). With a view to completing a correct record of the transaction, we beg to request that due note also be taken of the fact that, contemporaneously with the delivery on behalf of the Company of the executed contract, there were delivered to the contracting officer the Company's letter, dated January 13, 1919, setting forth the circumstances and reservations under which the delivery of the contract was made.

Very truly yours,

AMERICAN SMELTING & REFINING CO.  
By JOSEPH CLENDENIN,  
*Vice-President.*

EXHIBIT Z.

R. H. H. / omp.

War Department,

Office of the Chief of Ordnance,

Procurement Division,

Washington.

January 22, 1919.

To insure prompt attention, in replying refer to  
P. L. No. P4219-1788A.

Attention of Major R. H. Hawkins.

American Smelting & Refining Co.,  
120 Broadway,  
New York City.

GENTLEMEN:

1. This is to acknowledge the receipt of your letter of January 17 (P470. 15/12246), relating to your contract for copper, War-Ord.-P4219-1788A.

2. When you executed the contract you brought with the executed copies the letter dated January 13, 1919, to which you refer. That letter was filed in the files of this Division. The Contracting Officer then executed the contract on behalf of the Ordnance Department. The contract as executed by both parties was forwarded to the Auditor for the War Department without a copy of your letter.

3. The legal effect of your letter I can not undertake to express opinion upon. I assume that you signed the contract "under protest."

Respectfully,

CONTRACT SECTION,  
By R. H. HAWKINS,  
Major Ordnance Dept. U. S. A.

82

IX. *Demurrer to Amended Petition.*

(Filed January 5, 1921.)

The United States, by the Attorney General, demurs to the amended petition filed herein November 27, 1920, upon the ground that the same does not state facts sufficient in law to constitute a cause of action.

FRANK DAVIS, JR.,  
*Assistant Attorney General.*

J. ROBT. ANDERSON,  
CROWLEY WENTWORTH,  
*Special Assistants to the Attorney General.*

83

X. *Submission on Demurrer to Amended Petition.*

(January 10, 1921.)

Submitted on demurrer to amended petition by stipulation of the parties.

XI. *Order Sustaining Demurrer to Amended Petition.*

(Filed January 17, 1921.)

Order.

This case coming on to be heard was submitted upon the defendants' demurrer to the amended petition. On consideration whereof it is adjudged and ordered by the court that the defendants' said demurrer to the amended petition be and the same is sustained and the amended petition is dismissed.

It is further ordered that the opinion rendered upon the defendants' demurrer to the original petition stand as the opinion of the court on the question of the demurrer to the amended petition.

84

XII. *Final Judgment.*

(Filed January 17, 1921.)

Upon due consideration of the premises, it is ordered, adjudged and decreed that the defendants' demurrer to plaintiff's amended petition be sustained and that said amended petition be and the

same hereby is dismissed; and it is further ordered that the opinion rendered upon the defendants' demurrer to the original petition stand as the opinion of the court on the question of the demurrer to the amended petition.

By THE COURT.

85 XIII. *Application for and Allowance of Appeal.*

(Filed January 31, 1921.)

From the judgment rendered in the above-entitled cause on the 17th day of January, 1921, the claimant, American Smelting & Refining Company, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

KING & KING,  
*Attorneys for Claimant.*

Filed January 31, 1921.

Ordered: That the above appeal be allowed as prayed for.  
January 31, 1921.

By THE COURT.

86 XIV. *Clerk's Certificate.*

I, J. Bradley Tanner, Chief Clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the demurrer, the argument and submission of the case on demurrer; of the opinion of the court and final judgment, of the order setting aside the judgment and allowing an amended petition to be filed, of the amended petition with exhibits A to Z attached thereto, of defendants' demurrer to amended petition, of the submission on demurrer to amended petition, of the order sustaining the demurrer to amended petition, of final judgment, and application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 1st day of February 1921.

[Seal of the Court of Claims.]

J. BRADLEY TANNER,  
*Chief Clerk, U. S. Court of Claims.*

Endorsed on cover: File No. 28,085. Court of Claims. Term No. 728. American Smelting and Refining Company, appellant, vs. The United States. Filed February 8th, 1921. File No. 28,085.